

8487
No. 11660

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACOB S. GIMPELSON,

Appellant,

vs.

MAX KAUFMAN, Doing Business as the CHICAGO
HOTEL AND RESTAURANT SUPPLY, and
CHICAGO HOTEL, RESTAURANT AND
MEAT SUPPLY, INC., a corporation,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP 17 1947

PAUL P. O'BRIEN

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

JAMES M. CARTER

United States Attorney

RONALD WALKER

JAMES C. R. McCALL, JR.

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building
Los Angeles 12, Calif.

For Appellees:

HERZBRUN & CHANTRY

118 South Beverly Drive

Beverly Hills, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5837-BH Civil

JACOB S. GIMPELSON,

Petitioner,

vs.

MAX KAUFMAN, Doing Business as the CHICAGO
HOTEL AND RESTAURANT SUPPLY; and
CHICAGO HOTEL, RESTAURANT AND
MEAT SUPPLY, INC., a corporation,

Respondents.

AMENDED PETITION FOR ENFORCEMENT OF
VETERAN'S REEMPLOYMENT RIGHTS

Comes now the petitioner, Jacob S. Gimpelson, and by
leave of the Court heretofore granted, files this Amended
Petition and says:

I.

This petition is filed under the provisions of Section
8(e) of the Selective Training and Service Act of 1940,
as amended (50 U. S. C. A. App., Sec. 308(e)), and
Section 7 of the Service Extension Act of 1941, as
amended (50 U. S. C. A. App., Sec. 357); and juris-
diction of the Court is based thereon.

II.

The respondents are engaged in the wholesale and re-
tail meat business, and maintain and operate a plant, store
and office for the conduct of said business at 925-927
West Temple Street in [2] Los Angeles, California. Un-

til about March 31, 1946, respondent Kaufman owned and operated said business individually; but at or about the time he transferred and turned the operation of the same over to the respondent corporation, which he caused to be chartered for that purpose; and since that time the said Kaufman has operated said meat business by and through the respondent corporation, of which he is the dominant officer, director and stockholder, as petitioner is informed, believes and states.

III.

From January, 1941, until October 23, 1942, petitioner held a position, other than temporary, in respondent Kaufman's employ as general manager of his said meat business at the above location; and on or about that day, petitioner left that position in order to perform training and service in the United States Army, into which he was that day inducted under the Selective Training and Service Act of 1940. Petitioner satisfactorily completed his period of training and service therein on November 6, 1945, and received a certificate thereof pursuant to law. In December, 1945, and on several occasions thereafter within 90 days from November 6, 1945, petitioner applied to respondent Kaufman for reemployment in his former position as general manager of said meat business, and was refused.

IV.

At all times since November 6, 1945, the petitioner has been, and is now, still qualified to perform the duties of his former position as general manager and the circumstances of neither of the respondents has so changed at any time since October 23, 1943, as to make it either

impossible or unreasonable for them, or either of them, to reemploy and restore petitioner to his former position.

V.

From the date of petitioner's first application for re-employment aforesaid, to this date, the respondent Kaufman has [3] continuously failed, refused and declined to re-employ petitioner in his said former position, or in any other position of like seniority, status and pay; and since March 31, 1946, the respondent corporation has likewise continuously failed, refused and declined to so employ and restore him.

VI.

Petitioner's duties and authority in his former position as general manager of said business were to buy, sell and supervise the sale of all meats dealt in at such place of business, and to have charge and direction of all activities and affairs of said business. Petitioner's compensation therefor was a salary of \$35.00 per week, plus an automobile expense allowance of \$15.00 per week, plus a percentage of the profits as follows: 50% of the net profits of the wholesale meat business and 25% of the net profits of the retail meat business, both computed and paid monthly.

VII.

Petitioner is informed, believes and states that the respondent corporation, and all of its stockholders, directors and officers, have at all times had full knowledge of petitioner's former position in respondent Kaufman's employ, and of petitioner's right to reemployment in that position, and of all of petitioner's applications for reemployment therein, and of the refusal of all such applica-

tions; and that all of them acquired any such interest as they may have in the respondent corporation with that knowledge in mind.

VIII.

Although respondent Kaufman rejected all of petitioner's applications for reemployment as general manager of said business, he did offer petitioner temporary employment on January 3, 1946, in the inferior position of utility man in said meat business, but without any supervisory authority, and at a salary of only \$40.00 per week. The said Kaufman promised petitioner at that time that [4] such inferior position would end upon the organization of the then proposed respondent corporation, and that when it should be organized, petitioner would then be adequately and agreeably "taken care of." Petitioner accepted such temporary, inferior position, relying on said promise by Kaufman. Petitioner continued thereafter to be employed in such inferior position by the respondent Kaufman, and after March 31, 1946, by the respondent corporation, until May 1, 1946. On the latter date the petitioner was discharged without cause from that position by the two respondents.

IX.

Had petitioner been reemployed in his former position as general manager, at his former rate of pay, he would have earned therein an average of over \$1,200 per month throughout the period from January 3, 1946, to April 1, 1946, and over \$800.00 per month from April 1, 1946, to date; and he has suffered a loss of wages and benefits in that amount by reason of the respondents' action above set forth.

Wherefore, Petitioner Respectfully Prays:

(a) That the Court adjudge and decree that petitioner was entitled to be reemployed and restored to his former position as general manager of the respondents' meat business aforesaid, on January 3, 1946; and is now entitled to be so restored.

(b) That the respondents be required to so reemploy and restore the petitioner to that position, and to compensate him for his loss of wages and benefits suffered by reason of their unlawful actions aforesaid.

(c) That petitioner recover the fees and costs of the United States herein, for its benefit. [5]

(d) That petitioner have all such other and further relief as may be just and proper in the premises, and that he have general relief.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

JAMES C. R. McCALL, JR.

Assistant U. S. Attorney

Attorneys for Petitioner

[Verified]

[Endorsed]: Filed Dec. 4, 1946. [6]

[Title of District Court and Cause]

ANSWER

Comes Now the Respondent Chicago Hotel, Restaurant and Meat Supply, Inc., a corporation, appearing for itself alone and not for any other respondent admits, denies and alleges:

FIRST DEFENSE

The amended petition fails to state a claim against this respondent upon which relief can be granted.

SECOND DEFENSE

I.

Answering Paragraph II of the amended petition, denies each and all of the allegations thereof, but admits that this respondent is engaged in the wholesale and retail meat business and maintains and operates a wholesale plant, store, and office on Fremont Avenue, Los Angeles, California, and operates a retail [7] meat business at 927 West Temple Street, Los Angeles, California; admits that respondent Max Kaufman, was one of the original directors of this respondent which was incorporated on the 21st day of January, 1946; admits that said respondent Max Kaufman is an officer and director and owner of forty per cent (40%) of the capital stock of this respondent; alleges that this respondent began doing business at 915-27 West Temple Street in Los Angeles, California, on or about the 21st day of January, 1946.

II.

Respondent lacks sufficient information or belief to answer the allegations of Paragraphs III and VI of said amended petition, and basing its denial thereon, denies all of the allegations of said Paragraphs III and VI.

III.

Respondent denies each and all of the allegations of Paragraphs IV and IX of said amended petition.

IV.

Answering Paragraph V of the amended petition, respondent lacks sufficient information or belief to answer the allegations thereof insofar as they relate to the respondent Kaufman, and basing its denial thereon, denies the allegations of said paragraph insofar as they relate to the respondent Kaufman; denies each and all of the other allegations of said amended petition.

V.

Answering the allegations of Paragraph VII of said amended petition, this respondent denies each and all of said allegations insofar as they relate to this respondent, but lacks sufficient information or belief to answer said allegations insofar as they relate to other persons, and basing its denial thereon, denies each and all of said allegations insofar as they relate to persons other than this respondent. [8]

VI.

Answering the allegations of Paragraph VIII of said amended petition, this respondent lacks sufficient information or belief to answer the allegations of said paragraph insofar as they relate to the respondent Kaufman, and basing its denial thereon, denies each and all of said allegations insofar as they relate to respondent Kaufman; admits that petitioner was employed by respondent on or about the 21st day of January, 1946, until petitioner quit said employment of his own accord on or about the 1st day of May, 1946.

THIRD DEFENSE

Respondent alleges that it is an independent corporate entity separate, apart, and different from the wholesale and retail meat business formerly operated by the respondent Kaufman, that it has assets far in excess of the assets of the former business of said respondent Kaufman, and that it is in no sense dominated or controlled by respondent Kaufman.

FOURTH DEFENSE

Respondent alleges that at no time prior to his entrance into the military services was petitioner employed by respondent.

FIFTH DEFENSE

Respondent alleges that at the time of petitioner's employment by this respondent on or about the 21st day of January, 1946, and thereafter, petitioner was fully in-

formed and knew of the independent existence of this respondent, and that petitioner then and there agreed to work for respondent on the terms then and there agreed upon, and that petitioner then and there and later waived any other rights that he may have then or at any time had.

SIXTH DEFENSE

Respondent alleges that petitioner is now gainfully employed and has been so gainfully employed in a profitable business ever since petitioner quit respondent's employ on or about the [9] 1st day of May, 1946.

Wherefore, this answering respondent respectfully prays that petitioner take nothing from his petition on file herein, for costs of suit herein incurred, and for such other and further relief as may be just and proper in the premises.

HERZBRUN & CHANTRY

By David Mellinkoff

Attorneys for Respondent

118 South Beverly Drive
Beverly Hills, California [10]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 19, 1946. [11]

[Title of District Court and Cause]

ANSWER

Comes Now the Respondent Max Kaufman, sued herein as Max Kaufman, doing business as the Chicago Hotel and Restaurant Supply, appearing for himself alone and not for any other respondent, admits, denies and alleges:

FIRST DEFENSE

The amended petition fails to state a claim against this respondent upon which relief can be granted.

SECOND DEFENSE

I.

Answering Paragraph II of the amended petition, denies each and all of the allegations thereof but admits that for many years respondent owned and operated a wholesale and retail meat business at 915-27 West Temple Street in Los Angeles, California, [12] and admits that he was one of the original directors of Chicago Hotel, Restaurant and Meat Supply, Inc., a California corporation, which was incorporated on the 21st day of January, 1946; admits that he is an officer and a director and the owner of forty per cent (40%) of the capital stock of said corporation; alleges that said corporation began and he ceased doing business at 915-27 West Temple Street in Los Angeles, California, on or about the 21st day of January, 1946.

II.

Answering Paragraph III of the amended petition denies that for the period from January, 1941 until October 23, 1942, or for any other period, petitioner was the general manager of this respondent's meat business; admits that during said period and for some time previous

thereto, petitioner was an employee of respondent's; admits that in November, 1942, petitioner was drafted into the service of the United States Army and left respondent's employ; respondent lacks sufficient information or belief to answer the allegation in connection with the completion of petitioner's military service and basing his denial thereon, denies said allegation of said Paragraph III; denies that in December, 1945, or at any other time within ninety (90) days from November 6, 1945, petitioner applied to respondent for reemployment as general manager, but admits that in or about January, 1946, petitioner was reemployed by respondent and others, and was later employed by Chicago Hotel, Restaurant and Meat Supply, Inc.

III.

Respondent denies each and all of the allegations of Paragraphs IV, V, VII and IX of said amended petition.

IV.

Answering the allegations of Paragraph VI of said amended petition, respondent denies each and all of the

Am. Per and ent. 1/10/47 E.L.S., Clerk
by MEW, Dep. maximum

allegations thereof, but admits that petitioner's compensation during his employment by respondent was \$35.00 per week plus an automobile expense [13] allowance of \$15.00 per week, and admits that in addition thereto, upon petitioner's entrance into military service, respondent gave petitioner the sum of Two Thousand Five Hundred Dollars (\$2,500.00) which sum was based upon and computed from fifty per cent (50%) of the net profits of respondent's wholesale meat business, and twenty-five per cent (25%) of the net profits of respondent's retail meat business for the period from approximately April,

1942, to November, 1942, but denies that said percentage arrangement was other than a gratuity.

V.

Answering Paragraph VIII of said amended petition, respondent denies each and all of the allegations thereof, but admits that on or about the 3rd of January, 1946, respondent reemployed petitioner for general work in the business then operated by respondent and others at a salary of \$40.00 per week, plus weekly bonuses of \$25.00 given petitioner by respondent personally; admits that petitioner was similarly employed by respondent corporation from and after the 21st day of January, 1946, until petitioner quit said employment of his own accord on or about the 1st of May, 1946.

THIRD DEFENSE

Respondent alleges that the job performed by petitioner immediately prior to his departure for military service was of a temporary nature and further alleges that said position no longer exists, and that respondent's circumstances have so changed as to render it impossible and unreasonable to restore petitioner to said job or a position of like seniority, status or pay.

FOURTH DEFENSE

Respondent alleges that the profit sharing arrangement mentioned in said amended petition was a temporary arrangement, and that the circumstances which gave rise thereto have so changed that it would be unreasonable and impossible for respondent to reinstate said arrangement. [14]

FIFTH DEFENSE

Respondent alleges that prior to petitioner's departure for military service, all outstanding accounts and the

profit-sharing arrangement between petitioner and respondent were fully settled, satisfied, discharged, and terminated.

SIXTH DEFENSE

Respondent alleges that at the time of petitioner's re-employment by respondent on or about the 3rd of January, 1946, and thereafter, petitioner was fully informed and knew of the changed situation of the business then operated by respondent and others, and then and there agreed to work for respondent and others, and later for respondent corporation, on the terms then and there agreed upon, and that petitioner then and there and later waived any other rights that he may have then or at any other time had.

SEVENTH DEFENSE

Respondent is informed and believes and basing his allegation thereon alleges that petitioner is now gainfully employed and has been so gainfully employed in a profitable business ever since petitioner quit respondent corporation's employ on or about the 1st day of May, 1946.

Wherefore, this answering respondent respectfully prays that petitioner take nothing from his petition on file herein for costs of suit herein incurred, and for such other and further relief as may be just and proper in the premises.

HERZBRUN & CHANTRY

By David Mellinkoff

Attorneys for Respondent

118 South Beverly Drive

Beverly Hills, California [15]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 19, 1946. [16]

[PETITIONER'S EXHIBIT NO. 1]

PROFIT & LOSS STATEMENT

925 Temple

Wholesale—

Month of September

1942

Sales of merchandise		12982.96
Waste Sales $\frac{2}{3}$		131.42
		<hr/>
		13114.38
Less Sales discount		76.74
		<hr/>
Net Sales		13037.64
<u>Less Cost of Merchandise Sold</u>		
Purchases	13263.84	
Less merch to 927	2267.94	
	<hr/>	
	10995.90	
Less purchase dis.	29.81	10966.09
	<hr/>	<hr/>
Gross Profit		2071.55
<u>Less Cost of Merchandizing</u>		
Salaries	1080.90	
Delivery Expense	7.04	
Gas, Light, Power ($\frac{3}{4}$)	91.50	

Shop Supplies ($\frac{1}{2}$)	38.23	
General Expense $\frac{1}{3}$	32.66	
Insurance	66.00	
Laundry $\frac{1}{2}$	8.93	
Taxes	33.04	
Rent	100.00	
Telephone	32.42	
Sales, Collection Expense	115.00	
Dues to Association	16.00	
Max Kaufman, salary	170.00	
Banking Expense	1.21	1782.93
	<hr/>	<hr/>
Net Profit		\$ 288.62

Non cash expenses—

Amount to be determined
by Gimpelson & Kaufman

Depreciation machinery

Depreciation trucks

Bad debts if any..... ..

Inventory adjustment—

we have ending inventory but
not beginning inventory, however
ending inventory seems to be
rather large in comparison with
ordinary inventory and such amount
would increase profit.

PROFIT & LOSS STATEMENT

927

Retail

Month of September

1942

Sales		3538.92
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Waste Sales $\frac{1}{3}$		65.73
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Total Sales		3604.65
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<u>Less Cost of Merchandise Sold</u>		
--------------------------------------	--	--

Purchases	239.99	
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From 925 W. Temple	2267.94	2507.93
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Gross Profit		1096.72
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<u>Less Cost of Doing Business</u>		
------------------------------------	--	--

Salaries	450.00	
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Gas, Light, Power $\frac{1}{4}$	30.49	
---------------------------------	-------	--

Shop Supplies $\frac{1}{2}$	38.23	
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General Expense $\frac{1}{3}$	16.32	
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Insurance	10.00	
-----------	-------	--

Laundry $\frac{1}{2}$	8.93	
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Taxes	17.00	
-------	-------	--

Rent	30.00	
------	-------	--

M. Kaufman salary	55.00	655.97
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Gross Profit		\$ 440.75
--------------	--	-----------

Non cash items to me determined—

Depreciation equipment	[18]
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PROFIT & LOSS STATEMENT

925

Wholesale

March 1, 1942 – Sept. 30, 1942

Sales	83682.35
Tallow Sales	1059.44
	<hr/>
	84741.79
Less Sales Discount	793.92
	<hr/>
Net Sales	83947.87
<u>Less Cost of Merchandise Sold</u>	
Purchases	66209.80
	<hr/>
Gross Profit	17738.07
<u>Less Cost of Doing Business</u>	
Salaries	7039.20
Delivery Expense	610.88
Gas, Power, etc.	318.07
Shop Supplies	569.75
Shop Supplies Expense	351.57
Insurance	526.00
Laundry	60.54
Taxes	677.86
Rent	740.00
Telephone	251.06
Selling Expense	742.00
Shop Expense	
Donations	58.00
Advertising	8.00
Dues	90.53
Accounting Fees	140.00
Office Supplies	6.13

Max Kaufman, etc.

19

M. Kaufman, salary	1395.00	13590.42
Banking Expense	5.83	14590.42

Net Profit for period		\$ 4147.65
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[19]

PROFIT & LOSS STATEMENT

927

Retail

March 1, 1942 – Sept. 30, 1942

Sales	25,163.32
Tallow Sales	529.72

25,693.64

Less Cost of Merchandise Sold

Purchases	19,243.72
-----------	-----------

Gross Profit	6,449.88
--------------	----------

Less Expenses

Salaries	2252.50
----------	---------

Gas, Power, etc.	106.08
------------------	--------

Shop Supplies	284.87
---------------	--------

General Expense	117.19
-----------------	--------

Insurance	56.00
-----------	-------

Laundry	60.54
---------	-------

Taxes	169.48
-------	--------

Rent	210.00	3256.66
------	--------	---------

Net Profit	\$ 3192.66
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No. 5837-BH-Civ. Gimpelson vs. Kaufman et al.
Petr's. Exhibit No. 1. Filed Jan. 10, 1947. Edmund
L. Smith, Clerk; by MEW, Deputy Clerk. [20]

[PETITIONERS EXHIBIT NO. 2]

MUtual 6374-6375

Member
[Crest]

CHICAGO HOTEL AND RESTAURANT SUPPLY

====Quality Meats=====

925-927 West Temple Street
Los Angeles, Calif.

Max Kaufman, Pres.

J. S. Gimpelson

April 15, 1944

To Whom It May Concern:

Mr. J. S. Gimpelson has been associated with The Chicago Hotel Restaurant and Meat Supply Company for a period of seven (7) years. During that time, he has become familiar with the wholesale end of the business as well as the retail, for the reason that we operate four (4) retail meat markets.

Mr. Gimpelson is *thoroughly* capable in handling any jobbing house or retail meat problem which may arise. He also had complete charge of all the buying for three years, and knows *thoroughly* the grading of the various cuts as well as the marketing of meats.

Yours very truly

CHICAGO HOTEL AND RESTAURANT SUPPLY

Max Kaufman

MAX KAUFMAN, Pres.

MK/ep

No. 5837-BH. Gimpelson vs. Kaufman et al. Petnr's.
Exhibit No. 2. Filed Jan. 10, 1947. Edmund L. Smith,
Clerk; by MEW, Deputy Clerk. [21]

[Title of District Court and Cause]

MEMORANDUM OPINION

In the above entitled proceedings the court finds that it would be unreasonable to compel respondent to restore the petitioner to his former position.

It appears clear to me that the respondent, Max Kaufman, the former employer of petitioner, no longer owned and controlled the business where petitioner was formally employed. Max Kaufman in legal effect created a partnership with two of his brothers who owned 60% interest therein. This arrangement culminated in the formation of a corporation, the control of which was no longer in the hands of Max Kaufman.

When petitioner returned from the service he was apprised of this situation and accepted a different position than he formally held in the same business under the new ownership. I find that the [22] petitioner never made application for his former position until after the expiration of the statutory period.

The parties are all related and it is apparent that this proceeding is an outgrowth of a family disagreement, and the present proceeding is the result thereof.

I direct that the petition be dismissed upon the following grounds:

1. That the application for restoration was not made within the statutory period.
2. That the employer's circumstances and his successors in interest have so changed that it would have been unreasonable to restore the petitioner to his former position.

Respondent is directed to submit proposed findings and decree to this court within ten days.

Dated: Los Angeles, California, this 16 day of January, 1947.

BEN HARRISON

Judge

[Endorsed]: Filed Jan. 16, 1947. [23]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial on the 10th day of January, 1947, before the Court sitting without a jury, the petitioner appearing by his attorneys James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and James C. R. McCall, Jr., Assistant U. S. Attorneys for said District, and the respondents by their attorneys Herzbrun & Chantry and David Mellinkoff, Esq.; and the evidence having been received and considered, this Court, having filed its Memorandum Opinion herein dated January 16, 1947, does hereby find and decide as follows:

FINDINGS OF FACT

I.

The petitioner brings this suit under the provisions of [24] Section 8(e) of the Selective Training and Service Act of 1940, as amended (50 U. S. C. A. App., Sec. 308(e)), and Section 7 of the Service Extension Act of 1941, as amended (50 U. S. C. A. App., Sec. 357) seeking restoration of former position and compensation for respondents alleged failure to reemploy.

II.

On and prior to October 23, 1942, the respondent Kaufman owned and operated a wholesale and retail meat business on Temple Street, Los Angeles, and a meat market on Fairfax Avenue, Los Angeles, and employed petitioner, a nephew, in the Temple Street business.

III.

On October 23, 1942, the petitioner left his position in respondent Kaufman's Temple Street business to perform training and service in the Army, into which he was on that day inducted under the Selective Training and Service Act of 1940. The petitioner entered on active duty November 6, 1942, and satisfactorily completed his period of training and service on November 6, 1945.

IV.

In 1943, respondent Kaufman sold the Fairfax Market, and thereafter devoted his full time and attention to the Temple Street business.

V.

In December, 1944, the State of California, in eminent domain proceedings, condemned for road purposes the premises on which the Temple Street business was conducted. In 1944, the Temple Street premises were declared by an official of the City of Los Angeles to be unfit for the conduct of a wholesale meat business.

VI.

In 1944 and 1945, the respondent Kaufman (a man past sixty years of age) was in ill health, and was advised by a physician [25] to retire from business. By reason of ill health, the difficulties of staying in business during the meat shortage, and the necessity of finding

new premises for the business, the respondent Kaufman intended to retire from business completely, and would have done so but for the intervention of his two brothers, one of whom had previously been a business partner.

VII.

In 1945, the three brothers agreed to form a corporation in which the respondent Kaufman would own 40% of the capital stock, and his two brothers 30% each; it was further agreed by the three brothers that before the corporation began functioning, the business would be run as a partnership, with interests in the above proportions. In furtherance of this agreement, one of the brothers sold out his business interests in Chicago, and moved his family to Los Angeles.

VIII.

Before incorporating, the two brothers of respondent Kaufman advanced Eleven Thousand Dollars (\$11,000.00) with which to carry on the business and purchase new premises. Respondent corporation was incorporated January 21, 1946, and commenced active business operation on April 2, 1946. Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business. There is no evidence to indicate that respondent corporation was not formed for a bona fide business purpose, or that it is the alter ego of the respondent Kaufman.

IX.

In January, 1946, respondent Kaufman neither owned nor controlled the business where petitioner was formerly employed. Petitioner was employed in the business under the new ownership in January, 1946, and on April 2, 1946, by respondent corporation, [26] in a position dif-

ferent from the one held by petitioner on October 23, 1942. This new position was accepted by petitioner without objection after a full explanation of the changed circumstances and character of the business.

X.

Petitioner made no application for re-employment in his former position, or a position of like seniority, status, and pay prior to late March or April, 1946.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this case.
2. Petitioner made no application for re-employment in his former position, or a position of like seniority, status, and pay within the period prescribed by paragraph (b)(3) of Section 308 of the Selective Training and Service Act of 1940, as amended.
3. The employer's circumstances have so changed that it would have been and is unreasonable to restore petitioner to his former position, or to a position of like seniority, status, and pay.
4. Respondent corporation is an independent business entity without obligation to employ petitioner.

Dated: Feby. 17, 1947.

BEN HARRISON

United States District Judge

Received copy of the above this day.

~~Approved as to Form as required by Rule 7(a).~~

Dated: Jan. 29, 1947. James M. Carter, United States Attorney; Ronald Walker, Assistant U. S. Attorney, Chief of Civil Division; James C. R. McCall, Jr., Assistant U. S. Attorney, Attorneys for Petitioner.

[Endorsed: Filed Feb. 17, 1947. [27]

In the District Court of the United States in and for the
Southern District of California
Central Division

No. 5837-BH Civil

JACOB S. GIMPELSON,

Petitioner,

vs.

MAX KAUFMAN, Doing Business as the CHICAGO
HOTEL AND RESTAURANT SUPPLY; and
CHICAGO HOTEL, RESTAURANT AND
MEAT SUPPLY, INC., a corporation,

Respondents.

JUDGMENT

This case came on for trial on the 10th day of January, 1947, before the Honorable Ben Harrison, U. S. District Judge, sitting without a jury, the petitioner appearing by his attorneys James M. Carter, United States Attorney for the Southern District of California, and Ronald Walker and James C. R. McCall, Jr., Assistant U. S. Attorneys for said District, and the respondents by their attorneys Herzbrun & Chantry and David Mellinkoff, Esq., and the Court having heard and considered the evidence and having rendered its Memorandum Opinion herein on January 16, 1947, and having made and entered its findings of fact and conclusions of law;

Now, Therefore, by Reason of the Law and Facts, It Is Hereby Ordered Adjudged, and Decreed by the Court, as follows:

1. That the petition herein be and is hereby dismissed. [28]
2. That the clerk be and is hereby directed to enter judgment herein for respondents.

3. That petitioner take nothing by this suit.
 4. That respondents receive no costs of suit.
- Dated this 17 day of Feby., 1947.

BEN HARRISON

United States District Judge

Received copy of the above this day.

~~Approved as to Form as required by Rule 7(a).~~

Dated: Jan. 29, 1947. James M. Carter, United States Attorney; Ronald Walker, Assistant U. S. Attorney, Chief of Civil Division; James C. R. McCall, Jr., Assistant U. S. Attorney, Attorneys for Petitioner.

Judgment entered Feb. 17, 1947. Docketed Feb. 17, 1947. Book C. O. 41, page 664. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Feb. 17, 1947. [29]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the above named petitioner Jacob S. Gimpelson does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment entered in this case on February 17, 1947, in Civil Order Book No. 41, page 664, denying petitioner relief. This 14th day of May, 1947.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.,

Assistant U. S. Attorney

Attorneys for Petitioner

[Endorsed]: Filed & mld. copy to Herzbrun & Chantry, attys. for respdt. May 14, 1947. [30]

[Title of District Court and Cause]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

Comes now the petitioner Jacob S. Gimpelson, and as the Appellant herein, pursuant to the provisions of Rule 75(d) of the Federal Rules of Civil Procedure, states that the points on which he intends to rely on his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, are as follows:

I.

The evidence does not support any of the following findings of the District Court, to wit:

1. That appellant did not make application for re-employment in his former position or in a position of like seniority, status and pay, within the meaning of Section 8(b) of the Selective Training and Service Act of 1940 as amended, within 90 days following his discharge from the United States Army.

2. That the circumstances of appellee Max Kaufman had so [31] changed at the time of appellant's application as to make it impossible or unreasonable for him to reemploy and restore him to his former position, or to a position of like seniority, status and pay, within the meaning of Section 8(b)(B) of said Act.

3. That the appellee corporation, as the successor in business of Max Kaufman, was without obligation to the appellant under said section of said Act.

4. That Max Kaufman's business was run "as a partnership" between December, 1945 and April 1, 1946.

5. That there was an agreement between appellee Max Kaufman and his brothers that his said business "would be run as a partnership" between December, 1945 and April 1, 1946.

6. That the additional monies supplied by Max Kaufman's brothers "has increased the capital investment of the corporation to approximately three times the value of Kaufman's former business."

7. That appellant accepted the inferior position in which he was reemployed "without objection after a full explanation of the changed circumstances."

8. That in January, 1946, appellee Kaufman neither owned nor controlled the business where petitioner was formerly employed; and that the appellant was employed in the business under the new ownership in January, 1946, and on April 2, 1946, by respondent corporation, in a position different from the one held by petitioner on October 23, 1942.

II.

The clear weight of evidence was, and the District Court should have found that:

1. The appellant on October 23, 1942, left a position, other than a temporary position in the employ of the appellee Max Kaufman, as manager of Kaufman's wholesale and retail meat business; that his rate of pay was \$35 per week salary and \$15 per week expense [32]

allowance, plus 50% of the profits of the wholesale meat business and 25% of the profits of the retail meat business computed monthly; and that appellant left such position in order to perform training and service in the United States Army under the requirements of the Selective Training and Service Act of 1940.

2. That the petitioner was honorably discharged from the United States Army on November 6, 1945 and in December, 1945 applied to appellee Max Kaufman for reemployment, and was then and at all times thereafter, and is now still qualified to perform the duties of his former position.

3. That at the time of such application, appellee Max Kaufman had entered into an arrangement with two of his brothers under which, at a future unspecified date, it was planned to incorporate and expand his meat business; but the charter for said corporation was not issued until January 21, 1946 and it did not take over the business, and Max Kaufman remained in sole ownership and charge thereof, until April 2, 1946, and in the three months January-March, 1946, said business made \$9,295.47 profit, of which appellant's share would have been about \$4,131.00 at his former rate of profit-sharing, if he had been reemployed as manager.

4. That the circumstances of appellee Max Kaufman had not so changed, either beforehand, or between December, 1945 and April 2, 1946 as to make it impossible or unreasonable for him to restore petitioner to his former

position or to a position of like seniority, status and pay; and that he unlawfully refused to do so from January 3, 1946 to April 2, 1946.

5. That the appellant accepted employment by appellee Max Kaufman in the inferior position of handyman, at a straight salary of \$40 per week on January 3, 1946, but relied upon appellee Max Kaufman's representation to him that when the appellee corporation was formed appellant would be "taken care of"; and that appellant did not then, or later, accept such inferior position as [33] a fulfillment of appellee Max Kaufman's obligations under the reemployment provisions. That the appellee corporation continued appellant's employment in such inferior position, at a pay rate of \$55 per week, for 2 weeks after it took over the business on April 2, 1946; and that the appellee corporation took over the business of appellee Max Kaufman intact, knew of appellee Kaufman's reemployment obligation to appellant and was and is itself obligated to him thereby.

5. That after April 2, 1946, while each was able and obligated to do so, both of the appellees failed and refused to restore petitioner to his former position, or a position of like seniority, status and pay in said business, in violation of law, and of appellant Max Kaufman's agreement with appellant.

6. That appellant is entitled to be restored to his former position, or a position of like seniority, status and pay in the employ of appellee corporation and to be com-

pensated for his interim loss of wages and benefits by appellee Max Kaufman in the sum of \$4,131.00 up to April 2, 1946, and thereafter by both appellees until appellant shall be restored.

III.

The District Court erred in failing to adjudge and decree that appellant was entitled by law on January 3, 1946, to be restored to his former position as manager of the appellees' meat business, at his former rate of pay, and is now so entitled; and in failing to order the appellees to restore him thereto, or to a position of like seniority, status and pay, and to compensate him for the loss of wages specified in Point II(6), *supra*. [34]

IV.

The District Court judgment dismissing the petition should be reversed and appropriate relief here administered, or ordered on remand.

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.,

Assistant U. S. Attorney

Attorneys for Petitioner

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 38 inclusive contain full, true and correct copies of Amended Petition for Enforcement of Veteran's Reemployment Rights; Answer of Chicago Hotel, Restaurant and Meat Supply, Inc.; Answer of Max Kaufman; Petitioner's Exhibits Nos. 1 and 2; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Contents of Record on Appeal and Affidavit of Service which, together with one volume of reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 19 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable Ben Harrison, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

January 10, 1946, Los Angeles, California

Appearances:

For the Petitioner: James M. Carter, Esquire, United States Attorney; by James C. R. McCall, Esq., Assistant U. S. Attorney.

For the Respondents: Herzbrun & Chantry, 518 Security Building, 510 South Spring Street, Los Angeles, California; by David Mellinkoff, Esq.

Los Angeles, California, January 10, 1947, 10:00 A. M.
(Case called by the clerk.)

Mr. McCall: The Petitioner is ready, your Honor.

Mr. Mellinkoff: The Respondents are ready.

The Court: You may proceed.

Mr. Mellinkoff: May it please the court, I would like leave, with the agreement of the Government, to amend the answer by the insertion of one word on page 2 of the answer of respondent Max Kaufman, in line 32, after the word "petitioners" and before the word "compensation" there should be inserted the word "maximum".

The Court: Any objection?

Mr. McCall: No objection.

The Court: It will be changed by interlineation.

Mr. Mellinkoff: Thank you, your Honor.

Also, your Honor, petitioner's counsel and I have agreed to stipulate to the following facts:

"That the petitioner, Jacob Gimpelson, entered the military service on the 5th of November, 1942, and received a certificate of satisfactory completion of service—"

that is an honorable discharge,

"on the 6th of November, 1945." [4]

Mr. McCall: No. I find the correct date is October 23, 1942.

Mr. Mellinkoff: Isn't that the date of the induction notice?

Mr. McCall: No, that is the date of induction.

Mr. Mellinkoff: The date of entry on active service was November 5th, 1942, and the date of induction, October 23rd, 1942. That is stipulated as far as we are concerned.

Mr. McCall: And the certificate of discharge was November 6th, 1945.

Mr. Mellinkoff: Discharge?

Mr. McCall: Honorary discharge.

Mr. Mellinkoff: Also, that immediately before entering the military service he was employed by the respondent Max Kaufman and also the Chicago Hotel, Restaurant and Meat Supply, Inc.

Mr. McCall: I do not want to stipulate to any of the balance of it.

Mr. Mellinkoff: I thought you wanted to stipulate those dates.

Mr. McCall: We can prove that.

Mr. Mellinkoff: Also, your Honor, I have received petitioner's trial memorandum and there is a rather im-

pressive citation of cases attached to the memorandum which I do not feel are in point. [5]

The Court: Let us not argue that now, counsel. Let us find out what the facts are.

Mr. Mellinkoff: Very well, your Honor.

Mr. McCall: May it please the court, the petitioner desires to amend his trial memorandum.

The Court: Let us not pay any attention to the trial memorandum now.

Mr. McCall: This was a matter of dollars and cents, your Honor.

The Court: That will have to come out in the evidence. The trial memorandum is not evidence.

Mr. McCall: Will you take the stand, please?

JACOB S. GIMPELSON,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jacob S. Gimpelson.

Direct Examination

By Mr. McCall:

Q. Mr. Gimpelson, you live in Los Angeles?

A. Yes, sir.

Q. How long have you lived here?

A. Approximately ten years.

Q. During that time did you formerly work for Mr. Max [6] Kaufman? A. Yes, I did.

(Testimony of Jacob S. Gimpelson)

Q. Where was his business located and what did it consist of?

A. His business at the time I worked for him was located at 925-927 West Temple Street. It consisted of a wholesale house which was operated under the name of Chicago Hotel and Restaurant Supply and Retail, which was located at 927 West Temple Street. The wholesale was located at 925 West Temple.

Q. Both branches of the business were known by the name you have given there?

A. No, sir, only the wholesale.

Q. When did you first go to work for him?

A. In 1936.

Q. How long did you continue in the employ of Mr. Max Kaufman?

A. Up until the time I went into the service in October of 1942.

Q. At the time you left for the service state to the court what was the rate of your compensation?

A. At the time I left to go into the service I was receiving \$35.00 per week salary, \$15.00 per week expenses, and 50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail. [7]

Q. What was your position?

A. I was manager of the place.

Q. Of both branches of the business?

A. Yes, sir.

Q. Now, for how long had that arrangement for your compensation been in existence?

A. That arrangement for my compensation had been in existence since April 1942.

(Testimony of Jacob S. Gimpelson)

Q. Did you receive 50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail business?

A. Yes, I did. Let me correct that, please. I believe that it was from March 1942 through September of '42 that profit-sharing arrangement was in existence.

Q. When was it—had it been previously agreed to?

A. Yes, sir; it had.

Q. When had it been agreed to between you and Mr. Max Kaufman?

A. It had been agreed to—let me go back a bit and start with the way that profit-sharing arrangement came into being.

In 1940 I had gone back to visit my folks in New York. That was an authorized leave of absence. I came back from New York in the middle of 1940. Mr. Kaufman suggested to me that I—that while I had been away he had felt that [8] he was a fifth wheel in the business and—

The Court: What do we care about that, counsel? Aren't we interested in the compensation he received at the time that he entered the service?

Mr. McCall: That is right.

Q. Just state when it was—it was agreed that there should be a division of the profits, if you recall.

A. It was agreed in the beginning of 1942.

Q. And took effect in March of that year?

A. March of 1942.

Q. For how long a time prior to the profit-sharing arrangement had you been general manager of the place?

A. Since 19—Since the early part of 1941 I had been general manager.

(Testimony of Jacob S. Gimpelson)

Q. As general manager what were your duties?

A. To generally supervise the operation of the place. I purchased all the shop supplies. Did much of the purchasing of the meat. Sold myself and also supervised the sales effort of the other salesmen whom we had.

Q. Did you have anything to do with the selection of employees?

A. Yes, I did.

Q. Did you select a number of employees that are there now?

A. Yes, sir. [9]

Q. Did you give them directions what to do?

A. Yes, sir.

Q. What about the pricing of meats and the sale of them?

A. I would price the meats and I would tell the salesmen what to sell the meat for.

Q. Now, during the time that you were manager in 1942 was Max Kaufman around the place during the business day?

A. Yes, sir; he was.

Q. How frequently?

A. More or less frequently.

Q. Did he have other business interests?

A. He had an interest in a market on Fairfax, 401—403 North Fairfax.

Q. That was—

A. I believe he owned that market.

Q. Did he spend most of his time out at the Fairfax market or at this place on Temple Street?

A. He spent practically all his time on Temple Street.

The Court: On Temple?

The Witness: On Temple Street, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. By Mr. McCall: That is up to the time you went into the service?

A. Yes, sir: His major duties were the Fairfax market or major function was to collect or count money in the [10] till at the end of the day, to make the deposit and to ask the manager if there was anything he needed in the way of meats so that when he might go out to purchase meat for the wholesale he would purchase meat for the Fairfax market too.

Q. Now, when did you receive your share of the profits?

A. Just prior to going into the service. We had an accounting one evening and I received \$1,500.00, a check for \$1,500.00. The accountant had determined that the profit—50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail totaled approximately \$2,800.00 and Mr. Kaufman had suggested that he give me \$1,500.00 now and the balance he would pay out to me. He said it would be tough enough for him to get along without me and that—

Mr. Mellinkoff: I object to that as being not responsive and irrelevant. I would like the witness to answer the questions.

The Court: It does not prove or disprove anything. It takes more time to listen to the argument than it does to the evidence.

Mr. McCall: All right.

Q. You received the \$1,500.00 in cash?

A. Yes, sir; I did.

Q. What about the balance? How much was it?

A. And then he paid \$20.00 a week at my request to my mother for approximately a year. [11]

(Testimony of Jacob S. Gimpelson)

Q. Now, at the time that you entered the service was there a man in the employ of Max Kaufman at that place of business by the name of Mr. Morris Kaufman?

A. Yes, sir.

Q. What relation was he to Mr. Max Kaufman?

A. Brother.

Q. Now, for how long had Mr. Morris Kaufman been employed at that place of business?

A. I believe he was employed six months prior to my going into the service.

Q. Was he employed under you? A. Yes, sir.

Q. Was he employed by you?

A. Indirectly he was.

Q. And what happened about that?

A. Mr. Max Kaufman had come to me and told me that his brother Morris had gone broke in the retail store that he had—that Morris Kaufman had been operating a retail store on Wilshire and LaBrea, on LaBrea near Wilshire and Morris Kaufman had gone broke in that meat store and was hungry, according to Max Kaufman, and needed a job and Max asked me if I could use him.

The Court: What materiality is that, counsel?

Mr. McCall: That is not, your Honor. What he is now saying is not material. [12]

Q. Go ahead and testify.

The Court: He has testified that he was working there under a certain arrangement at the time he entered the service. Now, let us find out what happened after that.

Mr. McCall: All right, your Honor.

Q. Now, after you came out of the Army did you apply to Mr. Max Kaufman for re-employment?

A. Yes, sir, I did.

(Testimony of Jacob S. Gimpelson)

Q. And when and where was the application made?

A. I got back to Los Angeles on December 8th. On December 9th I called Mr. Max Kaufman and exchanged greetings with him. On December 10th I went down to see him. I talked with Mr. Max Kaufman on December 10th. Mr. Kaufman took me in back of the building, showed me a building, a framework of a building which he was in the process of constructing. He said that he had hoped to have that building finished for me when I got back.

He said that—I believe this is pertinent to the case. He said that he had hoped to make a corporation when I got back and in the corporation would be a brother Joe, who he said had come in from Chicago while I was on the way back from Iwo Jima and he said that his brother Joe had made a lot of money in the gasoline station business in Chicago and was interested in going into the meat business with him in Los Angeles. [13]

He said he hoped to make a corporation between the four of us, his brother Joe, Morris, myself and himself. And he said that he had hoped to use this building as the home of the corporation; that he was then in the process of purchasing a piece of property opposite the bank on Temple and Fremont, and he was also dickering with some house movers to move this framework of a building to that property.

Mr. Kaufman said that he hoped that when I got back to work that I would have patience with his brother, his brother Morris, who was then running the place.

He said that his brother Morris had carried the load while I was in the service. His brother Morris had been working very hard, was nervous and excitable and that

(Testimony of Jacob S. Gimpelson)

if I would have patience with him he would make everything right. That Joe knew how to handle Morris; when Joe come in from Chicago, come into the business, that Joe could handle Morris very well and everybody would be happy.

Q. By Mr. McCall: Now, what about your job now?

A. Then he told me that if I went back there I would find that it was much easier to do business now; that it was not necessary to cater to customers and that if I would just work with Morris for a while until Joe come back and did whatever was necessary for the business that he would smooth out any difficulties when Joe come back.

Then after I went back on that arrangement I worked there— [14]

Q. Now, wait a minute. Did all this conversation occur at one time? A. Yes, sir, it did.

Q. On the 10th of December?

A. The 10th of December.

Q. Now, did you go to work immediately?

A. I went to work—no, sir, I did not go to work immediately. I told Mr. Kaufman that I needed an automobile and a place to live and I would appreciate some time to find both.

He went with me to Cook Brothers to try to get an automobile. He did not offer to help me to find a place to live. I found a place to live. I got sick. I was sick for approximately two weeks. The first time in my life I was sick, and then after I recovered from the flu I went back. This was before the holidays.

I saw Mr. Kaufman. He suggested that I go to work after the New Year's; that things would be all mixed up

(Testimony of Jacob S. Gimpelson)

and Morris was excited as it was and that it would be better if I went to work after the New Year's.

I went to work on January 3rd of 1946.

Q. Now, when you went back to work what was your rate of pay?

A. I didn't ask Mr. Kaufman how much money I was getting but Mr. Kaufman on payday called me into the office [15] and said that he knew I didn't care about the hours or the actual compensation and that if he gave me \$40.00 a week it would keep Morris happy and that he would make it up to me when Joe come back.

Q. All right. Did you go to work and continue to work under that arrangement?

A. Yes, sir; I did.

Q. Did you have any automobile allowance at that time? A. No, sir, none at all.

Q. What were your duties?

A. I was working as a general flunky around the place. Just doing whatever was told me to do—boning meat, scraping the blocks, washing down the walls; hanging meat in the ice-box, cutting meat.

Q. Is that the type of work you did before you went into the service? A. No, sir.

Q. How long did you continue at that type of work?

A. I continued at that type of work until approximately April 10th.

Q. Of 1946? A. 1946, yes.

Q. Now, what happened on or about April 10th that changed your relations?

A. Well, Mr. Kaufman told me that he would make everything right when Joe came back—Joe Kaufman came back [16] from Chicago I would say sometime in Febru-

(Testimony of Jacob S. Gimpelson)

ary, the early part of February. At that time Mr. Kaufman showed no inclination of making anything right. I asked Mr. Kaufman repeatedly if he couldn't use me—couldn't use my abilities to better advantage than doing the type of work I was doing and he kept stalling me and telling me he would make things right when Joe came back. When Joe came back there was no sign of making things right. They still kept me doing that work and Mr. Kaufman said, "There is nothing to talk about now"; that before the corporation was formed he would take care of me and everything would be all right; that there was no point in talking about things now.

Q. When did you learn that a corporation had been formed? A. I learned that on April 1st.

Q. Of 1946? A. 1946, yes, sir.

Q. Who told you about it?

A. Mr. Kaufman on April 1st and he said, "Well, boys," and he put his hand here, he says, "today is April Fool's Day but don't let yourselves be fooled. I am the president of the corporation," looking right at me when he said that. That is when I learned that the corporation had been formed.

Q. When did the corporation take over the operation of the business, if you know? [17]

A. On April 1st.

Q. Was your pay for that week split as of April 1st between Max Kaufman and the corporation?

A. Yes, it was.

(Testimony of Jacob S. Gimpelson)

Q. After April 1st or during that week did you go on vacation?

A. No, sir, not immediately. At that time I told Mr. Kaufman I was pretty much upset with that. I began to get the idea that I was just—

The Court: Let us not talk about your ideas. Tell us what happened.

The Witness: Well, on April 1st, approximately, Mr. Kaufman took me down to his attorney and I talked with Mr. Kaufman at his attorney's in Mr. Mellinkoff's office, and they suggested to me that it was—I had told them that I believed that I had certain rights to my old job, to my seniority status and pay that I had enjoyed previous to going into the service. Mr. Mellinkoff and Mr. Kaufman told me that they felt that things could be worked out in the corporation; that I should take a vacation for a couple of weeks; that he would give me \$200.00 for a vacation and that when I came back we would have a meeting in Mr. Mellinkoff's office and Mr. Kaufman instructed Mr. Mellinkoff to talk in my behalf as regards that—my place in the corporation, what I could expect from the corporation and what the corporation could expect from me. [18]

Q. By Mr. McCall: Did you go then on a vacation?

A. Yes, sir, I did.

Q. And was \$200.00 advanced to you for that purpose?

A. Yes, sir, it was.

Q. After you returned—when did you return?

A. I returned approximately two weeks later.

Q. Approximately May 1st, around that time?

A. A little bit before that, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. Did you go back to work?

A. No, sir, I didn't.

Q. What were the circumstances and why not?

A. I went back and saw Mr. Kaufman and Mr. Kaufman asked me if I had found a business yet. I told him I hadn't looked for a business and he suggested that I buy a house. He said, "Any kind of a house." He said that I rent out rooms in that house. "There is lots of money to be made in that." I told him I wasn't interested in that; that I was interested in the meat business and I asked him if he had made an appointment with Mr. Mellinkoff and his brother so that we might all get together and talk over my place in the corporation and what the corporation could expect from me and he told me that he had not; that he had nothing to talk about with me about the corporation.

Q. Now, was anything said about your going back to work? [19]

A. He said that if I wanted to have patience and wait until he got his sausage factory built he would have a job for me in selling sausage.

Q. Was there any offer made or did you ask to go back to work in this Temple Street place?

A. Yes, sir, I did.

Q. And what did he say about that?

A. I told him that I felt I was entitled to have my old job back and he said that, "We are getting along very well without you and there is no reason why you should come back. We don't need a business man to run a meat business now. Anybody that has got meat is a king and I am going to have meat," and he said, "If you want to

(Testimony of Jacob S. Gimpelson)

buy some shares of stock in the corporation I will talk it over with my brothers and see if you fit in."

So I said that I didn't want to buy it. I said that I didn't think I would have to buy shares of stock to get my old job back.

Q. Now, was anybody else connected with that corporation, stockholders, other than the three brothers?

A. Not to my knowledge.

Q. You are a nephew of each one of the brothers?

A. No, sir, I am not. Mr. Kaufman's wife was my father's sister.

Q. So you were not actually related to Morris or Joe [20] Kaufman? A. No, sir.

Q. Did you have any talk with Morris Kaufman about your re-employment there in the store?

A. Not with Morris Kaufman. Morris Kaufman is a difficult man to talk with.

Q. How about Joe?

A. I had a talk with Joe Kaufman.

Q. When did you talk with him?

A. About two weeks after Joe Kaufman had come back. Joe Kaufman had asked me what the difficulty was between Morris and myself that could not be ironed out.

Q. When was this?

A. This was in the middle of February.

Q. 1946? A. Yes, sir.

Q. All right. There at the store?

A. Yes, right in back of the wholesale.

Q. Now, tell what happened, what was said between you and Joe Kaufman.

The Court: Just a moment. How would that be material? His employer was Max Kaufman, wasn't he?

(Testimony of Jacob S. Gimpelson)

Mr. McCall: Yes, your Honor. I want to show the corporation, the entity that took over the business had full knowledge of this matter, had full knowledge of his relation to the business and the circumstances under which he was [21] working there.

The Court: Go ahead.

The Witness: Joe Kaufman had asked me what the difficulty was between Morris and myself that could not be ironed out and I told him that the difficulty could be ironed out if somebody would work on it but nobody was attempting to work on it. "It looks like they are just trying to aggravate the difficulty," and I asked Joe Kaufman if he didn't know that before I went into the service I was getting fifty per cent of the profits of the wholesale and 25 per cent of the profits of the retail and Joe Kaufman told me that Max had told him that I was getting forty per cent of the profits of the wholesale and 25 per cent of the profits of the retail and I told Joe that his brother, Max, had lied to him when he said only forty per cent. I suggested to Joe that we go in to see Max now and find out if I wasn't getting fifty per cent and Joe said, "Well, what difference does it make anyway, stuff like that?"

Q. By Mr. McCall: Was anything said about your former position there as general manager or manager of the place of business?

A. Yes, sir. I had asked him if he didn't know that I was running the business before I went into the service. He said he did know that.

Q. Morris Kaufman, as you say, worked under you before [22] you went into the service?

A. Yes, sir, he did.

(Testimony of Jacob S. Gimpelson)

Q. Do you have any knowledge of the amount of profits of the wholesale and retail business of your own knowledge? A. No definite knowledge, no, sir.

Mr. McCall: I believe that is all.

Cross Examination

By Mr. Mellinkoff:

Q. Jack, when you were first employed by Max Kaufman—can you recall approximately when it was? You said in '36 sometime.

A. I believe it was in 1936, yes, sir.

Q. How old were you then?

A. I believe I was—well, 1396 was 11 years ago. I was about 23 years of age, 22 years of age.

Q. And just prior to that you had been living in the East? A. Yes, sir.

Q. And you came out here to go to work for Mr. Kaufman? A. That is right.

Q. When you first came out here where did you live?

A. I lived with Mr. Max Kaufman.

Q. Had you had any previous experience in the meat business? A. None at all. [23]

Q. At that time? A. None at all, sir.

Q. Now, when you first went to work for Mr. Kaufman what did you do?

The Court: Counsel, what materiality is that?

Mr. Mellinkoff: May it please the court—

The Court: You have raised the question here as to a change in conditions at this place of business. If this petitioner, when he went into the service, had a certain position with the company and unless there is some extraordinary reason why he should not be re-employed, he is

(Testimony of Jacob S. Gimpelson)

entitled to that position following his discharge from the service.

Mr. Mellinkoff: That is right, your Honor.

The Court: And what difference does it make whether the respondent trained him? Is there any question about the arrangement or his employment at the time he went into the service?

Mr. Mellinkoff: There is no question that he was employed. I am trying to give some of the background of this case to show what the relationship was between the parties and to indicate that the petitioner's estimate of his importance in the business there is not what he stated it to be.

The Court: I don't care what his importance was. What difference does it make in the case so long as he was [24] employed in a certain position? If he was employed in a certain position he is entitled to that position upon his discharge from the service unless he comes within the exceptions.

Mr. Mellinkoff: Precisely. I will endeavor to show that his position was not what he said it was and that when he came back he was taken back into the business. He wasn't doing exactly what he had been doing before he went into the service because of changed circumstances.

The Court: But according to the petitioner's testimony he had a profit-sharing arrangement prior to going into the service. You might call the profit-sharing arrangement some sort of bonus.

Mr. Mellinkoff: I would like to show your Honor that was a very temporary thing. I would like to show that for the vast period of his employment up until the time just before he went into the Army, all he had received

(Testimony of Jacob S. Gimpelson)

was a small salary and a commission and that this profit-sharing arrangement that he speaks of is something that he got because of the war and because of the departure of other people from the business; and now instead of it being a case of a veteran trying to be compensated for losses that he has suffered on account of the war, it is our position here that he is attempting to take advantage of a war-time situation which was the only reason why he got this so-called bonus. [25]

The Court: Then why don't you get down to that point? I do not care to hear about whether he lived with his uncle and the relationship between the parties.

Mr. Mellinkoff: Very well, your Honor.

Q. Jack, in 1941 what was your compensation from Mr. Kaufman?

A. I don't know exactly what it was, Mr. Mellinkoff. I would say that it was somewhere around \$25.00 a week and a certain amount for expenses and bonuses—small bonuses.

Q. I would like to show you this record to see if it refreshes your recollection and ask what your compensation was. A. This is the year 1940, sir.

Q. '41 starts here.

A. Yes, sir; that is right. There was some expense.

Q. This is just the Social Security record. It does not show your expenses. Now, what did you say that your salary was?

A. I thought it was around \$25.00 a week plus \$8.00 expenses, plus bonuses, small bonuses.

Q. This shows \$17.00. A. That is right.

Q. And in addition to that you got a bonus?

A. Small bonuses, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. Amounting to how much? [26]

A. I can't say exactly how much.

The Court: Approximately how much?

The Witness: Oh, it varied, sir. It would be up to about \$25.00 a month.

Q. By Mr. Mellinkoff: Your regular compensation during the bulk of 1941 was \$17.00 in salary plus expenses, is that right?

A. No. Here we start 1941 and I was getting \$25.00 a week plus expenses.

Q. Just a moment. Here is January 1941.

A. Right.

Q. Now, January to November the 8th?

A. Right.

Q. From January of 1941 until November the 8th, 1941, your regular weekly salary was \$17.00 plus an \$8.00 expense account, is that right? A. Yes, sir.

Q. And from the—that was down and to the 8th of October? A. Yes.

Q. From the 15th of October to the end of the year your regular salary was what?

A. \$25.00 a week.

Q. And at that time your expense account was what?

A. I don't remember. I think it was around \$8.00. [27]

Q. Or was it \$5.00?

A. It may have been. I don't recall.

Q. Then in 1942, from January of 1942 through March of 1942 what was your salary? A. \$25.00.

Q. And at that time your expense account was what?

A. About \$8.00, I think.

(Testimony of Jacob S. Gimpelson)

Q. Or could it have been \$5.00?

A. It could have been \$5.00 or it could have been \$15.00.

The Court: What was the expense account to cover?

The Witness: Automobile expenses, sir, and different types. For instance, in restaurants where I would go to eat and take orders from chefs sometimes and buy a package of cigarettes or something like that.

Q. By Mr. Mellinkoff: Then in April of 1942 down to October of 1942 your regular salary was what?

A. \$35.00 a week.

Q. And an expense account? A. \$15.00.

Q. Now, up until approximately October of 1942 had you ever been paid anything on account of a percentage arrangement? A. No, sir.

Q. All you had received was your regular salary plus an expense account? [28] A. Plus Bonuses.

Q. How much did the bonuses amount to?

A. I don't know, sir. I do not recall. You have the records there.

Q. Well, I have a record of a \$5.00 bonus here. Is that it?

A. That was one. You have other bonuses. You don't have the expense account either, do you?

Q. No, I don't have the expense account.

A. You don't have the list of the bonuses that we received—the other employees too received bonuses.

Q. I am not asking that. If you remember you can state to the court what if any bonuses you received.

A. I don't recall the amounts of the bonuses. I am sorry.

Q. Can you estimate them? A. I can.

(Testimony of Jacob S. Gimpelson)

The Court: If you have the record why argue about it?

Mr. Mellinkoff: I don't have the record readily available, your Honor. I would just as soon have the man state it if he knows it.

Q. Do you know a man by the name of Joe LaRue (?)? A. Yes, sir, I do.

Q. Was he working in the business at the same time you were? [29] A. Yes, sir.

Q. About when did he come into the business?

A. I believe he came into the business about 1939.

Q. And when did he leave the business?

A. He left sometime in 1941, I believe.

Q. October or November of 1941—about that time?

A. Well, it is difficult for me to say, sir.

Q. Do you know why he left the business?

A. Yes, sir; he left to go into the service.

Q. What was he doing before he went into the service?

A. He was working as a salesman under me, selling in Hollywood.

Q. Where were you selling?

A. I was selling downtown.

Q. You were selling downtown and he was selling on the west side? A. Yes, sir.

Q. Now, up until the time that he went into the service do you know what his salary was?

A. No, sir. It was approximately the same as mine.

Q. Approximately the same as yours?

A. Yes, sir.

Q. Now, at the time that—just before you went into the Army, when you got this money from Mr. Kaufman,

(Testimony of Jacob S. Gimpelson)

all together you got approximately \$2,500, is that correct? [30] A. That is right, sir.

Q. Including the \$1,500.00 to you and \$1,000.00 to your mother? A. That is right.

Q. But that was not the full amount represented by fifty per cent of the profits of the wholesale and 25 per cent of the retail, was it? A. That is right.

Q. I beg your pardon?

A. That is right, sir. It was not.

Q. And that settlement was based on what period?

A. From March of 1942 through September of 1942.

Q. But it was none the less agreed, was it not, that the money that you received at that time was in full settlement of the account for that period?

A. No, sir; that wasn't the way I understood it at all.

Q. What is that?

A. That is not what I understood at all.

Q. Did you understand there was some more money coming to you? A. Yes, sir, I did.

The Court: We are not trying an accounting suit here—something that happened before the war in this litigation.

Mr. Mellinkoff: Very well. [31]

The Court: Before his entry into the service.

Q. By Mr. Mellinkoff: Now, do I understand you to say, Mr. Gimpelson, that you bought the meats for the business before the war?

A. Yes, sir, I did. I bought much of the meats—not all but much of the meats that we used I bought.

Q. Who bought the rest of it?

A. Mr. Max Kaufman.

(Testimony of Jacob S. Gimpelson)

Q. Where did you buy your meats?

A. I bought meats in most every packing house in the City, Cudahy, Wilson. I bought meat at Great Western.

Q. Now, just for the sake of getting this clear—I don't want to be carping about what you mean by "buying meats". But when I asked you did you buy the meats I did not mean did you buy a leg of lamb or something like that. Were you buying a substantial portion of the meats sold in the business? A. Yes, I was.

Q. About what proportion would you say?

A. More than half. I can even do better than that, sir. I can tell you just about the items which I was buying and the items which Mr. Kaufman was buying.

Q. All right.

A. Mr. Kaufman was buying the straight beef, the carcass of beef. I was buying practically of the veal, [32] much of the lamb and practically all of the offal and pork products—ham, bacon, pork loins.

Q. That you say you bought from the Wilson Company? A. I bought from all of them.

Q. And Cudahy? A. Yes, sir.

The Court: Counsel, I do not care to hear any more along that line. Here is a man who returned from the service and we are now here to determine what kind of job he is entitled to be restored to, if any. Let us find out what the general picture is.

Mr. Mellinkoff: I would like to impeach this witness, your Honor.

The Court: Well, he said he was general manager of this store.

Mr. Mellinkoff: That is correct, and now he is testifying that—

(Testimony of Jacob S. Gimpelson)

The Court: If he was general manager or whatever his duties may have been as general manager he is entitled to that position if conditions are such that he can be restored to it, is he not, and not whether he is going to be permitted in the future to purchase hams or limited to pork products.

Mr. Mellinkoff: That certainly is not the issue. That is not the issue, but I think it is very material to find out what he calls being "general manager." I mean, after all, [33] "general manager" is a very vague term. He has stated that one of his jobs was the buying of meats which in a meat business, be it wholesale or retail, is most important.

Now, I have affidavits here from the Wilson Company—

The Court: Affidavits are not admissible, counsel. Here is a man who testified he was receiving \$35.00 a week, which includes expenses, and he was receiving fifty per cent of the wholesale profits and 25 per cent of the retail profits—

Mr. Mellinkoff: For a very limited period.

The Court: And you claim that was a temporary arrangement.

Mr. Mellinkoff: Yes, your Honor.

The Court: All right. Now, why not get into that question instead of determining whether he had to, as general manager, sweep the floors or whether he went out and bought ham and bacon.

Q. By Mr. Mellinkoff: Did you have any agreement with Mr. Kaufman, Gimpelson, before the war as to how long this percentage arrangement was to run?

A. No agreement, sir. I assumed it was to go indefinitely.

(Testimony of Jacob S. Gimpelson)

The Court: It isn't a question of what you assumed. Was there an agreement?

The Witness: No, sir. [34]

Q. By Mr. Mellinkoff: Was there anything in writing? A. No, sir.

The Court: Let us find out when this new arrangement was made. You said in March.

The Witness: Yes, sir.

The Court: Before you went into the service?

The Witness: Yes, sir.

The Court: What were you doing prior to that?

The Witness: The same thing I was doing after March.

The Court: Well, what was the occasion of the change in your arrangement at that time?

The Witness: This goes back to what I started to say, in 1940—

The Court: I do not want to go back to 1940. You had, as I understand, an arrangement for a percentage of the profits. What brought that about? What brought the change at that time?

The Witness: I had been working very hard in the place. I had been selling, I had been buying, I had been cutting meat. I had been delivering orders.

The business had not been very solvent. Mr. Kaufman owed the packing houses for several weeks' meat bills. We had not very good equipment. Mr. Kaufman said that if I would bear with him and work at that low salary, work with him until we had money in the bank, until the [35] business was established solidly then he would give me whatever I wanted from the business. He led me to believe that the business would some day be

(Testimony of Jacob S. Gimpelson)

mine. He told me so in these words. He said he had two children. He had a son who was studying to be a doctor and he had a daughter who was married to a big shot in the Philippines and that neither one of them needed the business; that I was the only one in the family who had ever done him any good in the business or who had an interest in the business, and he said if I bore with him, worked with him in the business at that low salary until the business was solid, then he would take care of me when the business was solid. He had told me that I was to receive \$25.00 a week salary and a 7 per cent commission on all the business which I did. He never gave me that 7 per cent commission. In lieu of that he said, after I had earned—worked there a long time, he said that he would give me whatever I wanted when the business was solid.

In the beginning of 1942 the business was solid and I talked with him and we derived at this profit-sharing arrangement at that time.

The Court: Proceed.

Q. By Mr. Mellinkoff: Now, Gimpelson, when you came back from the Army you testified that the first time you spoke to Max Kaufman was on the 10th of December. Is that [36] correct?

A. In person, yes, sir. I had called him the day before on the telephone.

Q. But on the 10th you saw him in person?

A. I believe so, yes, sir.

Q. Where at?

A. In the wholesale at 925 West Temple Street.

Q. Was anyone else present at the time?

A. Yes, sir; practically all the help that was there.

(Testimony of Jacob S. Gimpelson)

Q. Now, at that time, Gimpelson, was anything said about this percentage business? A. No, sir.

Q. Was anything said about how much money you were going to get when you came back to the business?

A. No, sir.

Q. Did Mr. Kaufman tell you anything about the changed circumstances of the business?

A. Yes, sir, he did.

Q. What did he tell you?

A. He told me that I was going to find it was much easier to do business now than it had been during my time.

Q. Aside from that. You already testified to that.

A. (No answer.)

Q. Did he tell you anything about money that had been invested in the business? [37]

A. No, sir, he did not.

Q. Didn't he tell you that Morris and Joe Kaufman, his brothers, had already given him some money?

A. He told me, I believe, that Morris Kaufman had given him a check. He showed me that check which he was carrying around in his pocket.

Q. How much was that check?

A. I don't recall exactly. I believe it was \$5,000.

Q. Did he say what that was for?

A. No, he said that they had given it to him before the corporation was going to be formed.

Q. He told you that a corporation was going to be formed?

A. He said that he figured on making a corporation, yes, sir.

(Testimony of Jacob S. Gimpelson)

Q. Did he tell you anything of the reason for taking in this new capital?

A. Well, other than the fact that Joe had money. I don't think he mentioned or specified any other reason.

Q. Anything said about the fact that the land owned by Mr. Kaufman and the land from which the business was being done was being condemned by the State in eminent domain proceedings?

A. Yes, sir. He told me that the buildings which he had been—which he had rented and which he was still renting had been condemned by the State. His words, "taken [38] away by the State," and he told me that it was necessary for him to move the framework of the building which he had been working on to a new location which he had had his eye on for the past nine years. He said this new location was to be on the corner Fremont and Centennial opposite the bank.

Q. Did he tell you anything of the capital required to purchase the new premises?

A. Fremont and Temple was the location of the new—where the building was to be moved to.

Q. You don't mean that the building that he was leasing was going to be moved, do you?

A. No. I mean the building that was in the process of construction.

Q. You mean a light frame building in the rear?

A. Yes.

Q. But not the building from which the business was being conducted at that time?

A. That is right. He rented that. He couldn't move it.

(Testimony of Jacob S. Gimpelson)

Q. And he told you that that had been condemned, that building? A. Yes, sir; he told me it had.

Q. And also that the adjacent premises that had been owned by Mr. Kaufman, that was used for the truck, did he tell you that had been condemned also? [39]

A. That was just a driveway. He did not say anything about that being condemned.

Q. He didn't tell you that that had been condemned?

A. Well, possibly he did.

Q. Did he also tell you that the Health authorities had objected to the use of these particular premises on Temple Street for a wholesale meat business?

A. No, sir, he didn't.

Q. Didn't say anything about the unsanitary condition existing there? A. No, sir, he did not.

Q. Did he tell you anything to the effect that the business actually no longer was his because his brothers now had an interest in it? A. No, sir, he did not.

Q. Well, what was said in regard to that \$5,000 check that you speak of?

A. He just showed me a check. He said his brother had made money, Morris had saved money during the war and had given him \$5,000 which he was going to use in the corporation.

Q. Did he say what he was going to use it for?

A. No, he didn't.

Q. Did he say anything about any money that Joe was putting in? [40]

A. Yes, sir. He said Joe had made a lot of money in the gasoline station business and that Joe was going to put in money into the business too.

(Testimony of Jacob S. Gimpelson)

Q. When was the first time that you learned what your salary was going to be after you came back?

A. That payday, the first payday.

Q. That would be when?

A. On a Wednesday.

Q. The first Wednesday after you came back in January, is that right? A. Yes, sir.

Q. And what was that pay check?

A. It was \$40.00 less taxes.

Q. Did you say anything at that time to Mr. Kaufman about the \$40.00?

A. No, I didn't. I had never asked him for money as long as I had been with him.

Q. In addition to the \$40.00, did Mr. Kaufman personally give you anything? A. No, sir.

Q. Up until the time that you left the business and after you came back how much money were you getting?

A. \$40.00 a week. Repeat that question, please, sir.

Q. From the time you came back after the war until the time that the relationship was severed sometime in April, [41] what was your rate of pay?

A. \$40.00 a week up until the last ten days of my employment—the last full week. I received \$55.00 a week and the last three days which completed the week after we had met in your office, I received, I believe it was, \$28.00—the proportionate share of the \$55.00 weekly salary.

Q. Isn't it a fact, Jack, that in addition to this \$40.00 a week Mr. Kaufman was personally giving you out of his own pocket \$25.00 a week?

A. That is not a fact.

Q. Was he giving you anything? A. No, sir.

(Testimony of Jacob S. Gimpelson)

Q. Didn't he tell you that \$40.00 a week was all that his brothers would stand for but that he would give you something besides that?

A. No, sir, that wasn't it at all.

Q. When did you first object to the \$40.00 a week?

A. I first objected to it about the time Joe came here or shortly before Joe came in.

Q. Which you said was the middle of February, is that right? A. Yes, sir.

Q. Now, up until that time had you said anything to Mr. Kaufman or to Morris Kaufman to the effect that you [42] should have more money?

A. Yes, sir, I did.

Q. When did you say that and to whom?

A. I talked with Max Kaufman many times. I told him it was extremely difficult to work under the conditions which I was working under.

Q. Let us talk about the money now.

A. I told him rent was very high, living conditions was very high. It was difficult for me to get along on that kind of money unless I dug into my savings.

Q. Was anything said about the percentage deal?

A. No, sir, it wasn't, not at that time.

Q. Nothing was said about that until after Joe came back, is that right? A. That is right.

Q. Was anything said about your position, so-called position as general manager? A. Yes, sir, it was.

Q. When was something said about that?

A. About a week after I had been there.

(Testimony of Jacob S. Gimpelson)

Q. Well, now, when you first came back was there anything said about your job as general manager?

A. Wasn't said in that many words. It was said indirectly. Max Kaufman asked me to go to work and work with Morris. [43]

Q. Did he tell you what you were going to do?

A. He said that I should just work with Morris. He left it up to me to do the work, to do the work what was necessary for the business.

The Court: Just a moment. You said the last ten days you were there you were receiving compensation at the rate of \$55.00 a week.

The Witness: Yes, sir.

The Court: What was the occasion of the increase from \$40.00 to \$55.00?

The Witness: Mr. Kaufman had said that the corporation had been formed and he said that the corporation's attorney had suggested I be paid more money and so he raised me to \$55.00 a week.

The Court: And you could have continued there at the rate of \$55.00 a week?

The Witness: I do not believe so, no, sir.

The Court: You quit of your own accord?

The Witness: No, sir, I did not.

The Court: Were you discharged?

The Witness: Yes, sir.

Q. By Mr. Mellinkoff: Now, after—oh, pardon me just a moment. Did you ever ask Morris Kaufman for your job as general manager?

A. No, sir, I did not. [44]

(Testimony of Jacob S. Gimpelson)

Q. Now, when Joseph Kaufman came back, you say in the middle of February, did you tell him that you were supposed to be general manager of the place?

A. Yes, I did.

Q. Now, when you came back did you get along with Morris Kaufman?

A. Not too well, no, sir.

Q. Did you ever fight with him?

A. No, sir.

Q. Did you ever threaten to kill him?

A. No, sir.

Q. Now, on the occasion that you spoke of when you came to my office with Mr. Kaufman and you got \$200.00, do you recall anything being said about a sausage business?

A. Yes, sir.

Q. What was said? Will you tell the court what was said?

A. You and Mr. Kaufman both told me that Mr. Kaufman and his brothers were intending to have a big business; that they were figuring on having me in that business; that from a long range viewpoint I should be interested in staying with that business because there was a need for that type of business in Los Angeles. That Mr. Kaufman thought I was a very good man and that he wanted me in that corporation and that he knew there wasn't enough work there for my abilities [45] at the present time.

This is what Mr. Kaufman said. And that when the sausage factory was built that there would be plenty of work for me as a sausage salesman or in charge of the sausage department. And I told you and Mr. Kaufman that I didn't know anything about the sausage business; that I was a manager of a wholesale and retail meat business.

(Testimony of Jacob S. Gimpelson)

Q. Now, what was the understanding when that conversation broke up?

A. The understanding was that I would take a vacation for two weeks and during that time Mr. Kaufman would talk with his brothers and would decide where I fit into the corporation and what the corporation could expect from me, and that when I returned from the vacation that we would have a meeting in your office and you would speak on my behalf to fit me into that corporation.

Q. Now, when you came back from your vacation of the three brothers, Max, Morris and Joseph, whom did you see?

A. Max.

Q. Did you see the other two at all?

A. Yes, sir, I did.

Q. Did you speak to them about your job?

A. No, sir.

Q. But you did speak to Max?

A. Yes, sir. [46]

Q. Now, approximately when did that conversation take place?

A. That took place either the latter part of April or it took place—it took place in the latter part of April.

Q. And where?

A. It took place partly in the new building which Joe was building and then we walked along the block to the old business, to the wholesale, and we talked in back of the wholesale.

Q. And what was said at that time?

A. Well, I asked Mr. Kaufman about my old job; if he had had a meeting with you and when I was to meet with you and with his brothers and he said that he had nothing to talk with me about and his brothers and you in

(Testimony of Jacob S. Gimpelson)

your office, and he said that he had that—that they were getting along very well now without me; that they were making more money than they ever made with me and that unless I chose to buy shares of stock in the corporation that they did not need me.

Q. Is that all that was said? Is that all that he said?

A. No. He said—I told him that I had—that I had been told by attorneys that I had legal rights as well as moral rights to have my old job back; that I hoped he would not force me to exercise my legal rights. I told him [47] that I had been assured by—

Q. Just a moment. Did Mr. Kaufman say anything else on this occasion that you recall?

A. Yes, he did.

Q. What else?

A. I showed him an extract of the Selective Service law and I told him—

Q. I am not interested in what you told him.

The Court: Let him tell what he told him. If you are going to have a part of the conversation let us have it all.

Mr. Mellinkoff: Very well.

The Witness: I showed him an extract from the Selective Service law and in the extract it stated I was entitled to have my seniority status and pay which I formerly enjoyed. And I asked Mr. Kaufman to please take it to his attorney, show it to his attorney and see if we couldn't get together to arrive at an amicable solution of this, and whether he liked it or not the relationship still existed; that it was extremely unpleasant for me to have publicity as regards our relationship and business. I asked him if we couldn't possibly work this thing out

(Testimony of Jacob S. Gimpelson)

satisfactorily and he said, "It looks like you will only be satisfied with legal means." His words were not "legal means." He said, "You will only be satisfied to turn this over to lawyers." He said, "Well, you go ahead." He said, "The State's lawyers are a [48] bunch of politicians. I have got a smart lawyer and he will make this out of a State's lawyer," and he took a handkerchief and squeezed it in his hand.

Q. That is enough.

A. You asked for his conversation and that is it, sir.

Q. Now, did you say anything to him at this time about the OPA? A. No, sir, I did not.

Q. Was the OPA mentioned in the conversation at all? A. No, sir, it was not.

Q. Are you sure? A. Pretty sure, yes, sir.

Q. Now, let me see. Do you recall anything like this being said? Do you recall that you said to Mr. Kaufman on this occasion that you are speaking of, that you knew some people down at the OPA?

A. I did know people there. I don't recall ever saying it to Mr. Kaufman. I may have.

Q. Do you recall something to the effect, saying something to the effect that Morris Kaufman did not know how to make the bills properly?

A. I said Morris Kaufman didn't know how to read and didn't know how to write and insisted on making out bills.

Q. And didn't you say to Mr. Kaufman that unless he took you back that he was going to get in trouble with the [49] OPA?

A. I told him that it was extremely likely he would.

Q. That he would what? A. Get into trouble.

(Testimony of Jacob S. Gimpelson)

Q. With the OPA? A. Yes, sir.

Q. Unless he took you back?

A. No, sir. Unless he had the bills made out properly.

Q. But you cannot recall whether or not you told him you knew people at the OPA?

A. I told you I did know people at the OPA. I cannot recall whether I had told him I knew people there. Possibly I did. If that satisfies you.

Q. And did you say to him furthermore that as far as you were concerned this thing was not going to cost you any money and it would put Mr. Kaufman to considerable expense? Did you tell him that?

A. Yes, sir, I did.

The Court: He told him the truth, didn't he?

Mr. Mellinkoff: I am afraid he did on that occasion. your Honor.

Q. Now, Gimpelson, in your complaint here you say that in December 1945 and on several occasions thereafter, within 90 days from November 6th, 1945, "petitioner applied to respondent Kaufman for re-employment in his former [50] position as general manager."

A. Yes, sir.

Q. Now, you have testified that up until sometime in the middle of February that nothing at all had been said in regard to this profit-sharing deal. Is that correct?

A. I believe so, reasonably correct, yes, sir. Let me qualify that. It was assumed if I did get my old position back—

Q. Who assumed that?

A. I did. And I hoped Mr. Kaufman did.

(Testimony of Jacob S. Gimpelson)

Q. Was anything said about it?

A. No, sir, I don't believe it was.

The Court: As I understand your testimony it was not until about April 1st that you made any protest?

The Witness: No, sir. I made protests from the first week I had been there as to the nature of my duties and to the position which I held and had been reassured each time.

The Court: By whom?

The Witness: By Mr. Max Kaufman, that first I would be given my old job back and everything would be taken care of when Joe came in; that that would take place in about two weeks. Joe didn't come in until about six weeks and I struggled along and then he said the corporation would be formed very shortly and that I would have everything I wanted before the corporation was formed. And I struggled [51] along like that under that promise, assuming that my old job would be given to me in a short time.

Q. By Mr. Mellinkoff: Now, wait a minute. Was anything said that you were going to get your old job back or they were going to try to make a place for you?

A. They said everything would be taken care of. They were the words he used. Those were the words used.

Q. Those very words? A. Yes, sir.

Q. Was anything said that you were going to get your old job back? A. Not in those words, no, sir.

Q. Very well. They did talk about putting in a sausage department?

The Court: I have heard enough about the sausage.

Mr. Mellinkoff: Very well, your Honor.

(Testimony of Jacob S. Gimpelson)

Q. Now, in your complaint, Gimpelson, you say that your compensation was—you had a salary of \$35.00 per week plus \$15.00 automobile expense, plus 50 per cent of the net profits of the wholesale, and 25 per cent of the net profits of the retail, both computed and paid monthly. Now, that statement is not true, is it?

A. No, sir, it is not. And I had told that to Mr. McCall. He had been on annual leave and he came back on January 6th. I remembered that after I signed it I spoke [52] with Mr. Stephens, another assistant United States Attorney, and mentioned to him that wasn't so—that while it had been computed it had not been paid monthly. Mr. Stephens said it wasn't necessary to amend that—that that was just a quibble of words.

Q. Do you know what the percent of the investment in the present business is, Gimpelson?

A. Will you repeat the first part of the question?

Q. Do you know what the extent of the investment in the present business is?

A. No, I don't.

Q. Do you know what the value of Mr. Kaufman's old business was?

A. No, sir, I really don't. His estimate of its value might be different from mine.

Q. Do you know how to grade meat?

A. What do you mean, do I know how? Am I qualified as an official grader, do you mean?

Q. Can you grade meat?

A. I can tell a good piece of meat from a bad piece.

The Court: Can you grade meat according to the requirements they have developed for grading meat?

The Witness: Yes, sir, I know that they have first grades, prime, choice, good, commercial, utility.

(Testimony of Jacob S. Gimpelson)

The Court: Can you tell the difference between them? [53]

The Witness: Yes, sir, I can.

Q. By Mr. Mellinkoff: How do you tell the difference between first grade and second grade?

A. It is pretty difficult. You can tell the difference between prime and choice. Also the young cattle will usually cut out to a better percentage.

Q. Morris Kaufman was in the business before you left for the Army, was he not? A. That is right.

Q. Did you know at that time that Morris Kaufman had previously been a partner of Max Kaufman?

A. Yes, sir. I knew that many years ago before I had come in.

Mr. Mellinkoff: That is all for the present time, your Honor.

Redirect Examination

By Mr. McCall:

Q. Did you after leaving the employment of the company or after April 1946, go to work for the Office of Price Administration? A. Yes, sir, I did.

Q. When did you go to work there?

A. September 12th.

Q. Are you working there at the present time?

The Court: When? [54]

The Witness: September 12th, sir.

Q. By Mr. McCall: Are you working there at the present time?

A. I am working for the Office of Temporary Controls which is under the Office of Price Administration.

(Testimony of Jacob S. Gimpelson)

Q. Have you computed how much you have received in wages during 1946? A. Yes, I have.

Q. How much is it? A. I believe it was—

Q. You can look at your figures.

Mr. Mellinkoff: What is he looking at?

Mr. McCall: Something he wrote up.

The Witness: You can look at it, too, sir, if you want to. This is a withholding statement from the Government.

Q. By Mr. McCall: How much did you make at the OPA in 1946? A. \$810.10.

Q. How much did you make in your employment with Mr. Kaufman?

A. I believe my earnings were \$520.00 plus \$200.00 for vacation, making \$720.00.

Q. And did you have any other earnings during the year 1946? A. Yes, sir. [55]

Q. Your total earnings then amounted to what?

A. \$1,530.00.

The Court: Counsel, what were his earnings for 1945?

Mr. McCall: Did you have any earnings in 1945?

A. The earnings of a sergeant in the Army.

Q. Other than that? A. No.

Q. That is all the money you received since you came out of the Army? A. Yes, sir.

Q. Up until January 1st? A. Yes, sir.

Q. What is your rate of pay down there?

A. My rate of pay is \$3,397.20 per year.

Q. Do you know how much that amounts to per week or pay period or month?

A. Well, I receive approximately \$223.00 every two pay periods, \$11.66 every two weeks.

(Testimony of Jacob S. Gimpelson)

Q. Let me ask you, was the business of Max Kaufman or this company continued at the same location so long as you were there? A. Yes, sir.

Q. Is it there at the same location now or not?

A. I believe that—I am sure that they operate the retail store there. I believe that they have moved the [56] wholesale to their new business, to their new building.

Q. Where is that now?

A. That is, I understand, on Fremont off of Temple.

Q. Now, the officers of the company—do you know who they are?

A. Yes, sir. I believe they are Mr. Max Kaufman, Mr. Morris Kaufman and Mr. Joseph Kaufman.

Q. I mean the offices which they hold?

A. Mr. Kaufman, as I understand, is the president.

Q. That is Max Kaufman?

A. Max Kaufman, yes. Mr. Joe Kaufman, I believe, is vice president, and Mr. Morris Kaufman is secretary and treasurer. That is my belief, sir.

Q. With respect to these allowances that you were speaking of, \$8.00 and \$15.00 a week, was there any accounting made of that or was that just actual money every week paid to you without any accounting?

A. Well, I don't know exactly how you mean "without any accounting." It was money given to me—whether I spent it or not it was money which was given to me each week.

The Court: You were supposed to spend it, were you not? You were using that for promotional purposes?

The Witness: Well, not necessarily, sir. Sometimes I didn't spend a dime and sometimes I spent 20 cents of

(Testimony of Jacob S. Gimpelson)

that. [57] Mostly it was just a form of compensation. It wasn't exactly an expense account.

Q. By Mr. McCall: In other words—

The Court: You did not pay any tax on it, did you?

The Witness: No, sir, I did not.

The Court: Let us not waste any time on that, counsel.

Q. By Mr. McCall: When did you first contact the Selective Service System about this matter?

A. I would say about a week after I had the talk with Mr. Kaufman and I had gone up to see Mr. Mellinkoff. I had requested an appointment with Mr. Mellinkoff to see if this couldn't be straightened out amicably and Mr. Mellinkoff told me he would see me in court, so then I went to the Selective Service Board and asked them to take steps to reinstate me to my former position.

Mr. Mellinkoff: I object to that. I do not see the materiality of any of this. I think we are getting far afield. We know that he took steps because we are here in court.

Mr. McCall: You admit he didn't show any laches? That is the point. Not guilty of any laches—no delay?

Mr. Mellinkoff: No. We are in court today and he just left there in April.

Mr. McCall: I believe that is all, your Honor.

Mr. Mellinkoff: May I ask something further, your Honor? [58]

The Court: Yes.

Mr. Mellinkoff: Just a few questions.

(Testimony of Jacob S. Gimpelson)

Recross Examination

By Mr. Mellinkoff:

Q. When you left the business in April, Gimpelson, that was April of 1946, didn't you go into some other business? A. No, sir, I did not.

Q. Weren't you in some kind of manufacturing business? A. No, sir, I was not.

Q. Didn't you tell people that you were going into business?

The Court: We don't care what he told people.

Q. By Mr. Mellinkoff: Now, one further point, Gimpelson. When you came back and saw Mr. Max Kaufman after your vacation, was anything said about your going back to work for your \$40.00 or \$55.00 a week?

A. He told me that he had nothing at all for me unless I chose to buy shares of stock in the corporation.

Q. When he said that wasn't he referring to your demands for a percentage?

A. I don't know what he was referring to. Those were his words.

Mr. Mellinkoff: That is all.

Mr. McCall: One further question, your Honor. On [59] the computation of this profit.

Q. By Mr. McCall: Was that made monthly?

A. We took a profit and loss statement each month and that was as far as we broke it down. It was simply to figure 50 per cent of that profit and loss statement of the wholesale and 25 per cent of that profit and loss statement of the retail. I knew about how much I was supposed to be making.

(Testimony of Jacob S. Gimpelson)

Q. So that was based on a profit and loss statement each month? A. Yes, sir.

Q. And then the whole amount was paid at the time you went into the service?

A. Yes, sir. Mr. Kaufman said the finances of the business were not too strong and he requested that I leave that profit in the business.

Mr. McCall: That is all.

The Court: We will take a short recess.

(Short recess.)

The Court: You may proceed.

Mr. McCall: Mr. Silverman, will you take the stand?

HARRY SILVERMAN,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows: [60]

The Clerk: State your full name.

The Witness: Harry Silverman.

Direct Examination

By Mr. McCall:

Q. Mr. Silverman, are you a resident of Los Angeles?

A. Yes, sir.

Q. How long have you lived here?

A. About 24 years, going on 25.

Q. What is your present occupation?

A. I am superintendent and manager of a cemetery.

Q. Which cemetery?

A. The Home of Peace Cemetery.

Q. For how long have you had that position?

(Testimony of Harry Silverman)

The Court: That is enough. Let us get down to what you want to find out.

Q. By Mr. McCall: Did you work for Max Kaufman during the period 1940 to 1942, any time in that period? A. I did.

Q. What?

Mr. Mellinkoff: Speak a little louder.

Q. By Mr. McCall: What position did you hold—what did you do? A. I was salesman.

Q. Outside salesman? A. Yes, sir. [61]

Q. For the wholesale business?

A. That is right. And in the mornings I was the outside salesman and in the afternoon I would come in and work inside.

Q. When you were working inside did you work in the retail store or wholesale? A. Wholesale.

Q. Did you come in after Mr. Arou left?

A. Well, it goes beyond that.

Q. You mean you were working there?

A. I was working there before and then when I went in the service I understood that Mr. Arou took my place.

The Court: Not what you understood. Just tell us what you know.

The Witness: Well, I know he had my place when I came out of the service. I was given my place back again and Mr. Arou went in the service.

Q. By Mr. McCall: As salesman what territory did you cover?

The Court: What is the materiality of that?

The Witness: West side of town.

Mr. McCall: I am trying to locate him, who he was.

(Testimony of Harry Silverman)

The Court: Well, he is present and pretty well located. He is located at a cemetery now.

Q. By Mr. McCall: While you were working there who [62] directed your activities, Mr. Silverman?

A. Well, Mr. Kaufman and Jack.

Q. Mr. Gimpelson you mean?

A. That is right.

Q. Jack Gimpelson? A. That is right.

Q. In other words, Mr. Gimpelson gave you such orders as Mr. Kaufman didn't give you?

A. That is right.

The Court: Mr. Kaufman was the boss, though, wasn't he?

The Witness: Yes, he was.

Q. By Mr. McCall: Did Mr. Gimpelson give you price figures and things of that type to quote?

A. Yes, he did.

Q. And did he tell you what to do and did you do it?

A. That is right.

Mr. McCall: I believe that is all, your Honor. I put this man on because he needs to go back out there and attend to that business.

The Court: Yes, he might lose some of his clients.

Mr. Mellinkoff: Just a moment. You are a cousin of Gimpelson, are you?

The Witness: That is right.

Mr. Mellinkoff: That is all.

The Witness: Also Kaufman is my uncle. I am a very [63] reluctant witness.

(Testimony of Harry Silverman)

Cross Examination

By Mr. Mellinkoff:

Q. What were your inclusive periods in the business, Mr. Silverman?

A. Oh, up until I went in the service—I don't remember exactly when I first started there. I think when Mr. Asimow was there before and when he left I took his place.

Q. About when was that?

A. I can't recall. Maybe Mr. Asimow can.

Q. Then you left the business when?

A. I came back from the service—

Q. No, I mean when you went into the service. When did you leave the business?

A. When I went into the service?

Q. Yes.

A. I was inducted March 4th, I think, of 1941.

Q. And this Joe Arou, he was working there prior to the time you left, wasn't he? A. That is right.

Q. Were you both selling in the same territory?

A. No. Joe Arou was a truck driver.

Q. Did he drive you around?

A. No. I didn't operate from a truck. I operated [64] from my own car.

Q. And then you came back when?

A. I think it was about October or November of 1941. It was just before Pearl Harbor.

Q. You came back October or November of 1941?

A. That is right.

Q. I didn't understand—what was the date you went in? A. The service?

(Testimony of Harry Silverman)

Q. Yes. A. March of 1941.

Q. Oh, I see.

The Court: The war did not last very long for him.

Q. By Mr. Mellinkoff: Then how long did you stay with the business after you came back?

A. I don't recall. I think it was maybe '43, sometime in '43 or '44. I don't remember.

Q. When you came back in October or November of 1941 Gimpelson was still there, is that right?

A. When I came back? Yes.

Q. And what were you doing at that time, when you came back?

A. I came back and went to my old job of calling on restaurants.

Q. On the west side of town? [65]

A. That is right.

Q. Was Gimpelson doing anything—was he selling?

A. Yes. He was selling downtown.

Mr. Mellinkoff: No further questions.

The Court: That is all.

Redirect Examination

By Mr. McCall:

Q. Did you work for Mr. Max Kaufman at the Fairfax market? A. Yes, I did.

Q. Was that prior to the time that you came to work at the Temple Street place?

A. Yes, it was. I think it was about '39, if I remember, '39 or '40.

Mr. McCall: That is all.

If your Honor please, that is the petitioner's case in chief except for some figures which I asked Mr. Asimow,

the accountant, for, and which the respondent is to produce, as to the profits and losses made during the period 1946.

I have not been able to—I haven't had an opportunity to go over the figures with Mr. Asimow and it is my supposition that the defendants will probably put him on. I would like to at this time close the petitioner's case in chief with the right to put Mr. Asimow on in case I [66] have had an opportunity to talk to him about the profit and loss statements. Is that all right with you?

Mr. Mellinkoff: Sure.

At this time, your Honor, I move to dismiss the complaint on file here on the ground that it has not been shown that there was—on the ground, your Honor, that it has not been shown that within 90 days after the petitioner's discharge from the service he made application for restoration of his old position.

The petitioner was discharged from the service on November 6th, 1945. His period for application for re-employment would expire February 6th, 1946, and the testimony so far in this case is all to the effect that up until the middle of February of 1946 there was no discussion whatsoever in regard to the profit-sharing arrangement. That is the real bone of contention in this case.

The fact of the matter is that the veteran came back, he was given a job by his former employer—

The Court: Let us not argue the case now, counsel. You will have an opportunity to argue the merits of the case later.

The testimony of the petitioner is that he complained from the start because he was not given his old job back.

I think there is sufficient evidence here to place the respondent on its defense. The motion will be denied. [67]

Mr. Mellinkoff: That motion was in regard, your Honor, to the defendant Max Kaufman and the respondent Max Kaufman. There are two respondents in this case, the corporation, Chicago Hotel, Restaurant & Meat Supply. As to the corporation I move to dismiss on the same grounds and on the additional ground, your Honor, that there had been no evidence or testimony to the effect that this corporation is an alterego of Max Kaufman. There has been no testimony that there was application for re-employment to the corporation. As a matter of fact, the admissions have been that there was additional money put in here and the only testimony by the petitioner of any identity whatsoever has been to the effect that the respondent Max Kaufman and his two brothers are the officers of the corporation.

Aside from that there has been nothing to indicate any responsibility or liability of the corporation as such.

The Court: What have you to say to that?

Mr. McCall: If your Honor please, this corporation is the successor to the business.

The Court: That would not make any difference. You have alleged it is the alterego but there has been no evidence to that effect. There has been no evidence here the corporation was ever the employer of this petitioner.

Mr. McCall: Yes. The employment continued under the corporation there for about a month. In other words, he was [68] taken in.

The Court: It was about April 1st, as I understand, that the corporation came into being. And when it came into being has only been by the statement of the petitioner that Max Kaufman came in and said he was the president.

Mr. McCall: That is correct.

The Court: That is the only evidence as to when the corporation took over the business.

Mr. McCall: That is correct. And the statement his pay was divided that week between Max Kaufman and the corporation.

The corporation, if your Honor please, is the successor of this business, just as in the Trailmobile case, which was decided by the Third Circuit Court of Appeals, where the subsidiary corporation was wiped out and the business was consolidated and merged under the parent corporation.

It was held that the parent corporation under those circumstances had become and was employer of these men.

The Court: But that was a different situation. That was a case where there was a merger of the corporation. There was a subsidiary corporation and there was a parent corporation, and they were consolidated.

Mr. McCall: That is correct, sir. I want to cite [69] also in support of the theory that this corporation is liable the United States Supreme Court case of—the Fishgold case where it held that the employer and some other group cannot deprive the veteran of his re-employment rights or diminish them in any manner. That is the holding in the Fishgold case.

Now, we have here a case, if your Honor please, of a man who had a right to a job in the employ of the employer; that he came back and was re-employed and within the course of the re-employment a corporation was formed which continued that same business. The original employer is simply merged into that and his affairs gone right on through and he is the president of the corporation. He was obligated to employ this man for a year and not to discharge him without cause. He did re-employ him, took him back into his employ and all the

parties, it may be assumed from the proof here, who entered into that corporation knew all about the situation.

The Court: But, Mr. McCall, here is the situation. Two men came into the business and put their money into it. Now, are these men to lose their profits because the man they entered business with had an arrangement providing for 50 per cent and 25 per cent division of the profits? That might hold against Kaufman, but how about the other men who are strangers to this man's employment?

Mr. McCall: If your Honor please, if the law means any- [70] thing—

The Court: Gentlemen, I will tell you what I am going to do. I am going to hear the evidence and let you brief the matter of facts. I cannot understand why, when there has been the relationship that existed between these people for all these years, they haven't been able to adjust the matter instead of coming into court and venting their spleens.

Mr. Mellinkoff: We tried to.

The Court: I think it should be adjusted. Common decency requires it. There has been a lack of cooperation on the part of either or both parties or one or the other in an effort to bring about a fair adjustment of this case.

As a matter of fact, this man would probably have been better off in the long run if he had gone back to the business and stayed there because the obligation is only for one year.

There have been a number of defenses here that may take care of it. It seems to me that counsel and the parties could spend a little time around the table and see if they couldn't adjust this between themselves. All that can be done now is a financial adjustment.

As I understand the evidence, the business has been separated. There is now a retail store and a wholesale store and it would not be possible for this respondent to be [71] manager of both places. It seems to me there should be some adjustment. My statements are not a reflection on any of these parties who got along so well for so many years together. Somebody is stubborn. I don't know whether it is the lawyers or whether it is the parties.

Mr. Mellinkoff: We can try it again, your Honor, during the recess. There has been an endeavor to draw this to an amicable solution, and that is certainly to be desired.

The Court: Because if the petitioner is entitled to a judgment in this case it will probably mean an accounting and a substantial amount. On the other hand, if the petitioner is not entitled to anything that is something else. If it goes one way he loses everything, and if it goes the other way the employer loses everything.

Now, when there is a dispute and a lawsuit it seems to be that there should be some basis upon which the parties can adjust their differences. There is a moral obligation here. There is no question about that.

The business here was operating at a good profit during the war period while this boy was overseas and that should be taken into consideration. Those who stayed at home and made money can afford to be fair with this man that went across the seas and that is the way I am going to approach this question. There may be legal barriers because of which he cannot recover. I don't know. And there may [72] be a way whereby he can recover and under those circumstances I think it would be good business on the part of both parties to end this litigation by some kind of an adjustment.

Here is a boy that this man has raised, in a sense, in the business.

Mr. Mellinkoff: That is right.

The Court: And they should not be here in a family quarrel. They should not be here. Somebody has been unfair. I don't know who. Here is a man who has an established business. He has a reputation in the community for having kicked out his own nephew that he practically raised because he found it not convenient to furnish him employment when he comes back. He must have some self-respect in that regard. On the other hand, the petitioner has some obligation in this case because of the relationship between them. Your uncle has done a lot for you in times gone by. He has given you some opportunities. You should take that into consideration.

I think that these two men should go out and keep the lawyers out of it and everybody else and settle their differences. That is what I think should be done. I don't know whether to blame it on the lawyers. I don't know whether there is too much interference or not. Sometimes I think there is in these cases. And I think that both of [73] them should be able to settle it on a basis that when they get through they can shake hands and forget their dispute here in this courtroom. One is an old man and one is a young man. One is too old to fight and the other was young enough to fight. One made the money while the other was fighting. Now, there ought to be a common basis upon which these parties can get together. I don't know which one it is that wants to fight. I don't know whether you had enough fighting during the war or whether you still want to fight, or whether you still want to see if this cannot be adjusted in a manner that will be fair.

He certainly is not entitled to the profits of a business that has been augmented by additional capital. That is a certainty. It wouldn't be fair and wouldn't be just. And I think these parties can come nearer doing the just thing and the fair thing between them, that will be fair in the long run, fairer than any decision this court can give because when this court renders a decision it is going to hurt somebody. Not necessarily when I am looking at you—I don't mean necessarily going to hurt your client. It is just as likely to hurt the petitioner in this case.

This is one of those cases that is a toss-up. It could very easily be decided either way. It has been the policy of this court to give the petitioners the break. In other words, give the evidence a liberal construction. On [74] the other hand I can see very easily there are some very definite legal barriers that may preclude this veteran from making a recovery.

If decided here it may go to the Circuit Court. It may be affirmed. It may be reversed. A decision will come down two years hence and in the meantime hard feelings have developed and been engendered between these people when there should be good feelings. This situation should not have been permitted to develop.

I am going to adjourn the case until two o'clock. I would like Max Kaufman and the petitioner to go out and have lunch together and see if they can't sit down at a table and settle this matter like father and son should settle their disputes. Both should be willing to give and take and when you get through settling it shake hands, come back and tell me you have done so. We will recess now until two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until 2:00 o'clock p. m. of the same day.) [75]

Los Angeles, California, January 10, 1947, 2:00 P. M.

The Court: You may proceed.

Mr. Mellinkoff: May it please the court, I believe we will have to proceed with the case.

The Court: Proceed.

Mr. Mellinkoff: Mr. Asimow.

WILLIAM E. ASIMOW,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William E. Asimow.

Direct Examination

By Mr. Mellinkoff:

Q. Do you know the petitioner in this case?

A. Yes, sir, I do.

Q. Do you know the respondents?

A. Yes, sir.

Q. Are you the accountant for the respondents?

A. Yes.

Q. How long have you been in the employ either of Max Kaufman or of the respondent corporation?

A. Well, when you say "employ" you mean as public accountant or as an employee? [76]

Q. Well, how long have you had a business association with either of the respondents?

A. Since 1929.

Q. Since when? A. 1929.

Q. In 1941 were you the accountant for Max Kaufman? A. Yes.

Q. Do you know what the pay of the petitioner Gimpelson was at that time?

(Testimony of William E. Asimow)

A. Well, as stated in the Social Security records—I don't recall the exact amount.

Mr. McCall: I don't think there is any question about that, your Honor. It was testified to this morning by the petitioner himself.

Mr. Mellinkoff: Is it stipulated that the—

Mr. McCall: He testified in accordance with the figures there.

Mr. Mellinkoff: —that the pay of the petitioner for the time shown in these records is as shown in these records?

Mr. McCall: It has already been proved. There is no question about it.

The Court: I don't think there has been any dispute on that. What I am interested in is the pay he was receiving in the position he held at the time he entered the service.

Mr. Mellinkoff: That is in these records, your Honor, [77] as far as his regular pay is concerned.

The Court: Yes.

Q. By Mr. Mellinkoff: Were you present, Mr. Asimow, when the settlement was made between Max Kaufman and Gimpelson just prior to the time that Gimpelson went into the service? A. Yes, I was there.

Q. Would you state to the court in your own words what took place at that time?

A. I presented a profit and loss statement showing the profits for the period March 1st to, I believe September 1st. I may not be exactly sure of those dates.

(Testimony of William E. Asimow)

Q. September 1st or 30th?

A. September 30th, I believe. And we used that base as a base for effecting a settlement and I was the arbitrator between them.

Q. And what amount was agreed upon?

A. They agreed to settle for \$2,500.00 all outstanding differences between them.

Q. Was that more or less or the same than 50 per cent of the profits of the wholesale and 25 per cent of the profits of the retail as shown by that statement?

A. It was less.

Q. Was there any statement made at that time by either party to the effect that this arrangement was one that was [78] to continue?

A. You are asking me to state my opinion?

The Court: Not your opinion. What was said?

The Witness: Well, as I recall it, after the amount had been agreed upon between the parties, Kaufman drew a check or had me draw a check for \$1,500.00, and Jack agreed to accept the balance in weekly payments to his mother. They shook hands on the deal and they seemed to be very friendly at the time. I don't—the only understanding, I think there was between them at that time as to the future relations, was that when Jack got out of the Army there would always be a place for him if he wanted to come back. Under what conditions he would come back, that is, percentage-wise, there was no definite understanding as to that.

The Court: There wouldn't have to be. The law fixes that.

Q. By Mr. Mellinkoff: Now, prior to the period covered by this statement, did Gimpelson receive anything

(Testimony of William E. Asimow)

by way of percentage of the profits of Max Kaufman's business? A. No.

Q. No, prior to the war were you—I will reframe that question.

Are you familiar with the general operation of Max Kaufman's business—were you prior to the war?

A. From an accounting standpoint, yes. [79]

Q. What is that?

A. From an accounting standpoint.

The Court: Speak up.

The Witness: From an accounting standpoint.

Q. By Mr. Mellinkoff: Well, up into 1940 you actually worked in the business, didn't you?

A. That is right.

Q. From your knowledge of Max Kaufman's business, let us say up until 1940, can you say who ran the business?

A. At the time I left it was definite that Kaufman was the boss there. There was no question of it in 1940.

Q. Did you know Gimpelson at that time?

A. Yes.

Q. Prior to the time you left the business as such to become the accountant for the business did you give Gimpelson any instructions as to any operation of the business?

A. No. We both took our instructions from Kaufman. I don't think there was a question of either one giving each other instructions. We worked together.

Q. Did you tell Gimpelson anything about sales routine?

A. When I first came to work for Mr. Kaufman—

(Testimony of William E. Asimow)

The Court: Counsel, I do not care anything about that. It has been admitted, I think, that this man was employed at the time he entered the service at a certain figure and under [80] certain conditions—\$35.00 a week and a certain percentage of the profits.

Now, he was entitled to be restored to that position unless he comes within the exemption, upon his having a certificate of having completed his service in the Army. I mean his service in the Army.

I have given the parties an opportunity to settle their differences. The thought I have in mind is this, that up until the date of the incorporation, at which time apparently there was a change, new capital came in, and there was a new organization. I think unquestionably that this petitioner was entitled to his wages and his percentage of the profits up until the time of the incorporation.

Mr. Mellinkoff: Doesn't your Honor take into consideration the fact that the statute makes an exemption for a change in the circumstances of the employer?

The Court: I say subject to any exemptions that may exist that have not been developed.

But the question the court is really interested in now is whether there has been a change in the condition of the employer such as would make it impractical to re-employ the petitioner, but there has to be a pretty strong, compelling reason for that.

Mr. Mellinkoff: Right.

The Court: Now, if this man was still operating his business and the petitioner was entitled to be restored to [81] his former position, and of course it is all subject to evidence and I am only making this statement so you will confine your evidence to the points the court has in mind,

(Testimony of William E. Asimow)

but a change in that business occurred, a corporation was formed and there was a change in ownership, and if it is true outside capital came in, that may be such change that there would be no liability after that period. But there would have to be pretty strong, compelling reasons why prior to April 1st he should not have been restored and received his wages and a percentage of the profits during January, February and March.

Mr. Mellinkoff: Very well, your Honor. On that assumption I will concentrate only on such changes of circumstances as existed prior to that time, prior to this date in April.

The Court: I would like for the accountant to tell us what the profits of the business were in the Temple Street market, I presume, for the first three months of 1946.

Mr. Mellinkoff: Could I come to that in just a moment, your Honor?

The Court: I will let you approach it the way you want, but that is some of the information the court wants.

Mr. Mellinkoff: That will be in evidence before this witness is through.

Q. Mr. Asimow, are you familiar with the property from [82] which Mr. Kaufman conducted his business?

A. Yes, sir.

Q. What property did that consist of?

The Court: Can't it be stipulated to? Is there any question about it that the original property was condemned and it was necessary to vacate those premises? Can't the date of that vacation be agreed upon?

Mr. McCall: I understand they are still operating there.

(Testimony of William E. Asimow)

The Court: I understand they are operating a retail market in one place and a wholesale market in another place.

Mr. McCall: But they still occupy the same property.

The Court: But there was a division of their business.

When you move a wholesale plant to one place and the retail plant in another place that is a physical division.

Mr. Mellinkoff: May it please the court, I offered to make such a stipulation to save time with counsel, and I will renew that offer at this time. I would like to have it stipulated that on December 14th, 1944, a condemnation suit was filed affecting what is known as Parcels No. 10, which was the truck lot immediately adjacent to the buildings used by Kaufman; that the property, the lots there were owned by Mr. Kaufman personally and judgment of condemnation was entered in that case on the 30th day of October, 1945. I would like that as one stipulation if it may be stipulated [83] to.

Mr. McCall: If your Honor please, we have no knowledge of it and I do not consider it material one way or the other.

The Court: I don't care what you consider material. The court considers it material that if these premises were vacated there should not be any—

Mr. McCall: They were not vacated, your Honor. That is the point. They were still there.

The Court: Do you want me to dismiss this case and throw it out of court in a hurry?

Mr. McCall: No.

The Court: Then do some of the things I want done.

Mr. McCall: All right. I want to know of course if you want a stipulation such as indicated we will send and

(Testimony of William E. Asimow)

get the record, but I do not care so much about the condemnation. I want to know when Mr. Kaufman vacated any portion of these premises.

The Court: A judgment of condemnation does not mean anything if they are permitted to remain. As I understand from the testimony here they are still operating the retail market on part of this property.

Mr. Mellinkoff: On the leased part, that is correct, your Honor, and they are subject even as far as the retail business there is concerned to vacate that on 30 days notice. [84]

The Court: That does not make any difference; they are operating there.

Mr. Mellinkoff: Yes, that is correct.

The Court: Are you willing to stipulate that they are still operating their retail market at that location?

Mr. McCall: Yes.

The Court: All right. Now, when did they move the wholesale business to the other location?

Mr. Mellinkoff: Can you testify to that, Mr. Asimow?

A. I don't know the exact date.

Mr. McCall: About October this year—1946.

The Court: October 1946?

Mr. McCall: Yes.

The Court: Will you ascertain that from your client?

Mr. Mellinkoff: I am informed, your Honor, that insofar as the large cooling room and this new location on Fremont, that that has been in use for approximately nine months and as far as bag and baggage every last vestige of the wholesale business that was moved was moved approximately three months ago.

The Court: All right, go ahead.

(Testimony of William E. Asimow)

Q. By Mr. Mellinkoff: Mr. Asimow, do you know whether or not prior to the incorporation of the respondent corporation, whether or not any additional capital was put into Max Kaufman's business from others than Max Kaufman? [85]

A. Yes. Additional capital was put in in November. They went into escrow on the property across the street with funds advanced by Joseph Kaufman.

Q. How much money was put in?

A. I believe he put in \$6,000 at that time.

Q. What is that? A. \$6,000.

Q. Who put in \$6,000? A. Joseph Kaufman.

Q. Did Morris Kaufman put in anything?

A. At a subsequent date Mr. Morris Kaufman put in \$5,000.

Q. Was that before the incorporation or after the incorporation?

A. That was before the incorporation or, now, the \$5,000 may have come in shortly after the charter was issued, but all this money came in before the books were set up for the corporation.

Q. When were the corporate books set up?

A. I was requested to set them up February 1st, but I did not set them up until April 1st.

The Court: When did the corporation take over the business?

The Witness: It would be April 1st.

Q. By Mr. Mellinkoff: And prior to April 1st, \$11,000 [86] had been put in by Joseph and Morris Kaufman.

A. Yes, and an additional fifteen came in before April 1st from Joseph Kaufman.

(Testimony of William E. Asimow)

Q. An additional \$15,000?

A. Yes, sir; there was \$26,000 at the date of incorporation.

The Court: In the incorporation how were the shares divided?

The Witness: 40 per cent to Max Kaufman and 30 per cent to Joseph Kaufman and 30 per cent to Morris Kaufman.

The Court: And the corporation took over the individual business of Max Kaufman as of April 1st?

The Witness: Yes, sir.

The Court: And your report of earnings have been based on that?

The Witness: Yes, sir.

The Court: All your accounting has been based on that?

The Witness: Yes, your Honor.

Q. By Mr. Mellinkoff: When was the corporation actually incorporated, do you know that?

A. January 22nd, 1946.

Q. Now, prior to the incorporation of the corporation do you know whether or not there was any understanding between Max Kaufman, Morris Kaufman and Joseph Kaufman as to their relationship in that business? [87]

A. At the time they first discussed the corporation in November of 1945, they agreed that as soon as the charter came through, why, they would consider themselves all members of the same business.

Q. They agreed to what?

A. They would consider themselves as partners, as members of the business. I was advised that the corporation charter had been issued January 22nd, and I was

(Testimony of William E. Asimow)

instructed to begin drawing up corporation books, but I didn't have the time necessary to do it so I suggested that they work out the same basis, the corporate basis and use that as a distribution of the profits for the three months so there would be no misunderstanding between the three of them as to who was to share in the profits the first three months while I was preparing the records.

Q. Do you know how it happened that this new capital came into the business at all?

A. Yes. I was aware of it. As I say, Joseph Kaufman came from back East in November and Max approached him with the idea of putting this capital into the business in order to put up a building because they could no longer continue under their present circumstances and he felt that if he—that he would rather go out of business than risk his own capital in this new venture and that if Joseph Kaufman, who was looking for a proposition at the time, was interested [88] they would all pool their resources and put up this building and incorporate it and so share the responsibilities and the risk involved.

Q. How did Morris Kaufman figure in these plans?

A. Morris Kaufman had been a valued employee of Max Kaufman and it was the understanding that he was to also have—

Mr. McCall: Your Honor, I don't want to object too much, but I do object to the use of the word "understanding". This witness is telling what the understanding was between these men.

The Court: I have been waiting for you to object because I don't think any of this is material. None of it is binding upon the rights of the veteran.

(Testimony of William E. Asimow)

Mr. Mellinkoff: Very well, your Honor.

Q. Now, drawing your attention, Mr. Asimow, to the period between approximately the 3rd of January, 1946, and approximately, I believe, the 2nd of April, 1946, can you state what the profits of Max Kaufman during that period were?

The Court: You are asking of the individual or the business?

Mr. Mellinkoff: Well, both, if your Honor please.

A. The profit of the business for January 1st to March 31st, before any allocation between the respective [89] parties, was \$9,295.47.

The Court: That was for the entire business?

The Witness: Retail and wholesale.

The Court: What was the wholesale?

The Witness: At that time the business was in a confused state as to the corporation and we made no distinction between the two departments. In other words, records were not kept between the two departments. They were all grouped under one heading, but we estimate that the profit of the retail might be \$2,000 and the profit of the wholesale would be \$7,263. That is subject to inspection and correction. That is just a guess on my part based on prior operations.

Q. By Mr. Mellinkoff: Now, Mr. Asimow, this gross figure here of \$9,295.47, does that take into consideration any allowance of salary to Max Kaufman?

A. No. There is no allowance for Max Kaufman's salary in that profit.

Q. Of your knowledge of the business and with your experienced as an accountant, could you make any estimate

(Testimony of William E. Asimow)

of what a fair deduction from that for salary to Max Kaufman would be?

Mr. McCall: I object to that, your Honor, as being immaterial.

Mr. Mellinkoff: It is very material. [90]

Mr. McCall: And this witness has not been qualified.

The Court: Let me ask this question. When you made the settlement with the petitioner in this case and Max Kaufman was there any consideration as to salary for Mr. Kaufman at that time in estimating it?

The Witness: We discussed it at that time and it was some of the background in arriving at the settlement. We took into consideration depreciation. That was not shown on the statement. And there was mention made of Max Kaufman's salary at the time we settled for a flat sum. There is no way of saying exactly what we used, but we did consider it because I distinctly remember bringing it up as a point. In fact, on a statement that I issued I made a note that Max Kaufman's salary, the profit was stated before his salary and I think they used that as a basis in coming to their \$2,500.

The Court: I will let the evidence go into the record.

Q. By Mr. Mellinkoff: Now, could you answer that question, Mr. Asimow?

A. I don't know that I am competent to answer the question as to his value.

The Court: Then if you are not competent do not answer it.

The Witness: I can guess, if it please the court.

The Court: We are not asking for guesses. [91]

Q. By Mr. Mellinkoff: Now, taking this figure as it is without any further deductions at all, what portion of

(Testimony of William E. Asimow)

that gross sum would you say Max Kaufman would be entitled to under his agreement existing at the time?

A. He would be entitled to 40 per cent of that profit.

Q. And on what basis do you give that answer?

A. Well, the corporate setup was arranged that way, 40, 30, 30, and the first three months of operation were to be taken into consideration.

Mr. McCall: I object. The corporation did not take over until April.

The Court: Let me ask you this: When this money was put into the company did they then act as co-owners of the business until the corporation actually took it over—until you closed the books of the business and set them up in the name of the corporation?

The Witness: They acted in a rather managerial capacity.

The Court: But their interest in the business was the same as in the corporation?

The Witness: That is right.

The Court: So that it was in a sense, until the corporation went into effect, a partnership?

The Witness: It was an unofficial partnership. It was [92] an interim status until the corporation could be effected.

Mr. McCall: I object to the witness' answer as not being qualified to answer that question and I would like to develop some facts so your Honor will understand what the situation was by asking this witness—

Mr. Mellinkoff: May it please the court, I do not think anyone is better qualified than this witness to state what the practical operation of the business was.

(Testimony of William E. Asimow)

The Court: May I ask, was this \$9,000 distributed or was it simply kept in the business?

The Witness: It was kept in the business and was used in valuing the assets for the corporation. It was a definite factor in the transfer of the assets to the corporation.

The Court: I know, but your statement makes it more confusing than ever. These other parties invested money in the business with the understanding that it would be incorporated and the two brothers were to get a 30 per cent interest each?

The Witness: Correct.

The Court: 30 per cent of the stock, and that money went into the business before they were actually incorporated and before the corporation took over the business?

The Witness: That is right.

The Court: In the meantime did the other two men draw salaries? [93]

The Witness: They drew salaries, yes. They were working for—well, they were connected with the business.

The Court: When there was \$9,200.00, approximately, in excess of their salaries in the business?

The Witness: That is right.

The Court: And that continued as a part of the assets of the corporation when you set up the books?

The Witness: No. There was a cut-off date on April 1st, and we valued Max Kaufman's assets by a physical inventory, assigning values to them and transferred them to the corporation and he put high values on certain items and we were to take this \$9,000 into consideration in evaluating those assets by that sum so that they would arrive at a fair settlement between themselves.

(Testimony of William E. Asimow)

They felt that the corporation should be organized when the charter was issued and the business was very profitable for the first three months and they felt they would be cheated unless they had some basis for sharing in those profits. At that time they considered themselves members of the business. At the time it was just a matter of formality that the corporation was not started until April 1st.

Q. By Mr. Mellinkoff: Mr. Asimow, I ask you this: Is there any further deduction or correction of this gross of \$9,000 that you as an accountant feel should be made here? [94]

A. I feel there should be a reasonable allowance for Max Kaufman's salary, to be arrived at by mutual understanding.

Q. Anything else?

A. And the share allocated to the two participants in the corporation.

Q. What about this inventory matter?

A. It was brought to my attention at the time we drew up the statement that the beginning inventory was understated—that is, there had been an understatement from the year before when they put their ending inventory in 1941, which did not include all merchandise, but when the business was transferred they took a physical inventory and presented the proper figures. But I have no way of knowing whether that is right or wrong. I took the figures as they were given to me.

Q. Mr. Asimow, you were present in court this morning when the petitioner testified that he was the meat purchaser for Max Kaufman before the war?

A. Yes.

(Testimony of William E. Asimow)

Q. Can you state of your own knowledge and from your observation of the business who purchased the meats for Max Kaufman before the war?

A. Well, what period are you referring to? How far before the war? I left in 1940. At that time Max Kaufman [95] was the purchaser. After that I am not certain.

Q. Do you know of another market that Max Kaufman had before the war aside from the Temple Street market? A. Yes.

Q. What market was that?

The Court: Fairfax Avenue, Fairfax Street, isn't that right?

The Witness: Yes.

The Court: We have heard enough about that.

Mr. Mellinkoff: One further question, your Honor.

Q. Do you know when Mr. Kaufman sold that market?

A. I am not certain as to the exact date. I believe it was in 1943—perhaps later. I am not sure.

Q. And at any rate it was after Mr. Gimpelson left for the Army? A. I believe so.

Mr. Mellinkoff: That is all for the moment.

Cross Examination

By Mr. McCall:

Q. Mr. Asimow, when this money you spoke of a while ago—a while ago you spoke of this money being put in escrow. That was put up by Joseph Kaufman, the \$6,000? A. That is right.

(Testimony of William E. Asimow)

Q. "parties participate in the profits"? You mean that they were to acquire that store when the transfer was made?

A. Well, they were to use the profits that had been made—that is, their percentage of the profits as a definite asset in their name.

The Court: Contribution?

The Witness: Contribution.

Q. By Mr. McCall: On this item of the papers to which you are referring, where you read off the three months profit was \$9,295.47, an item appears of salary, \$6,097.30. Does that include the salaries paid to Morris and Joseph Kaufman? A. Yes.

Q. And I will ask you if that is—are those figures—[99] are those the figures which were used in the preparation of income tax report of Mr. Max Kaufman?

A. I haven't prepared his income tax return yet but when we do we will have to distribute the respective shares and Joseph Kaufman will have to report 30 per cent and Morris Kaufman will have to report 30 per cent of that profit on their own individual returns.

Q. These two men at that time were drawing salaries instead of shares? A. That is right.

Q. Now, I will ask you if you have prepared a statement of the net profits of the business since April 1st, 1946? A. Of the corporation itself?

Q. Yes.

Mr. Mellinkoff: May it please the court, I object to that. It is my understanding we are to confine ourselves to the period—

The Court: But I am going to let him make a record if he wants to and then if the Circuit Court wants to re-

(Testimony of William E. Asimow)

view it they will have all the figures and will not have to send it back for re-trial.

Mr. Mellinkoff: I submit it would be prejudicial to the hearing on this case and those figures could be obtained from a master in the event that there would be a decision that [100] those figures were necessary. And additionally, your Honor, any figures that are presently available would be tentative figures because the income tax returns, of course, have not been prepared as yet and I would make that objection to the introduction of those figures at this time.

The Court: If the witness knows what the earnings are he can answer the question. The objection is overruled.

The Witness: The earnings, of course, are always adjusted at the end of the year for physical inventory purposes up to that time.

The Court: You have your inventory?

The Witness: No. This statement we refer to is November 30th. We haven't worked on December as yet.

The Court: It wouldn't be complete, Mr. McCall.

Q. By Mr. McCall: Don't you compute monthly profits and loss statements? A. Yes.

Q. And this is a compilation of those from the beginning of the company down through November?

A. Not necessarily accurate. They are just a guide. At the end of the year, of course, we make all the final adjustments and might materially change it and might not—accruals and adjustments and other things.

Q. As of November 1st—from April 1st, 1946 what were the net profits of the company as of November 1st? [101]

(Testimony of William E. Asimow)

Mr. Mellinkoff: Now, may it please the court, I object to that because the witness has stated that these figures are not—

The Court: Objection sustained.

Q. By Mr. McCall: Do you have the monthly profit statements? A. This is a monthly—

The Court: Counsel, it isn't going to do me any good unless I have the balance of the year and he hasn't those figures. It would not mean anything to me one way or the other and wouldn't mean anything to you. It would only be a part of the year.

Mr. McCall: I thought I might be able to get that.

The Court: We are not trying to satisfy our curiosity here. If he could give us an accurate figure to January 1st, I would permit it, but he says he hasn't those figures, and I do not care for a part of it. That would not mean anything.

Q. By Mr. McCall: How long will it take you to compute the figures to January 1st?

A. I would have to close the books of the corporation and make an audit. I imagine it might take another month.

Q. About a month before you could get the accurate figures?

A. I would say two to three weeks anyway. [102]

Q. How much was paid for that property out there?

The Court: I think that is immaterial, counsel. We are not inquiring into all the business of these people. After all, it is a private business.

Mr. McCall: I am interested, your Honor, in—what I am trying to find out about is the total amount as com-

(Testimony of William E. Asimow)

pared to the amount of money that was put in here by the brothers.

The Court: If the stock was divided into certain proportions, one received 40 per cent and the other two 30 per cent each that would indicate the present ownership.

Q. By Mr. McCall: Mr. Asimow, do you know whether or not Max Kaufman drew weekly checks from the business?

A. He probably did but they were charged against his drawing account and never charged against the profits of the business.

Q. What do you mean? Do you show on any of these figures his drawing account?

A. Well, we have it in the balance sheet, showing his net withdrawals from capital, but the drawings of a private individual is never charged against the profit of a business.

Q. You mean the amount that he might have drawn weekly or otherwise would not appear on this statement?

A. No, sir, not until it was incorporated and he became an employee of the corporation. Then it became an officer's salary. [103]

Q. Do you know how much he drew during that period?

A. He drew out amounts—sometimes he would draw an even amount—sometimes draw \$1,000. It had no relation to the business whatever. He drew what he wanted or needed.

Q. Was that true during this three months period?

A. Yes. He was still operating in the manner of an individual and drew accordingly, and paid his income tax on his drawings. Of course now that it is a corporation

(Testimony of William E. Asimow)

he restricts himself to personal payments out of his own personal account.

Q. Do you have any records that would show the date on which these different sums of money were paid?

A. Different sums?

The Court: Paid to whom?

Mr. McCall: Sums of money paid by Morris and Joseph Kaufman.

A. I would have to inspect the record. You are referring to the five and six and fifteen?

Q. By Mr. McCall: Yes; the dates on which they were paid.

A. I don't have the exact dates with me. We could obtain them. I do know that—I believe the first deposit would have been in November, I believe, and subsequent contributions were during the three months period. I would be guessing. I would have to inspect the record. [104]

Q. By Mr. McCall: In other words, you don't know? You haven't got the dates?

A. That is right. If you ask me within a certain period I could definitely state, but not the exact dates, no.

Q. You don't know whether Joe Kaufman was drawing any salary out of the business from January 1st on through or not, do you?

A. He drew a salary. I don't know whether it started January 1st, but I believe he drew a salary starting in

(Testimony of William E. Asimow)

February. Now, I am not certain of the exact date of that, but I do know he drew a salary in March and probably a good part of February. I am not sure if he drew any in January. I think he was back east at the time.

Q. Were you in on any of the conversations between Mr. Joe Kaufman and Morris Kaufman and Max Kaufman about the proposed organization of this company?

A. Yes, I was in on them.

Q. When?

A. Oh, I think the first time they asked me to come over was in November.

Q. Who was present?

A. Morris Kaufman, Joe Kaufman and Max Kaufman. At that time I was attempting to obtain fifty-one per cent of the corporation stock for Max Kaufman, but the other two thought that was too much. [105]

Q. This was in November?

A. I believe it was.

Q. What other conferences were you in on?

The Court: What materiality is that?

Mr. McCall: I am trying to find out what he means by the understanding.

The Court: They put in money. There was a change of condition. The corporation actually took over on April 1st. I don't want to keep you people here all night while you stand up and scratch around for questions to ask.

Mr. McCall: I will stop right now, your Honor.

The Court: And the same applies to you, counsel.

Mr. Mellinkoff: Yes, your Honor. I have just a few questions.

(Testimony of William E. Asimow)

Redirect Examination

By Mr. Mellinkoff:

Q. Mr. Asimow, can you state to the court what Mr. Gimpelson has been paid since he returned from the service?

A. I believe the record will show that—I think it was \$40.00 a week.

Q. How much?

A. \$40.00 a week, and I think his last check was \$55.00.

Q. And what about the figure of \$200.00?

A. And \$200.00 before he left, yes. Mr. Kaufman paid [106] him that personally. There was no record of that on the books, but Mr. Kaufman paid it out of his own personal funds.

Q. What about weekly payments of \$25.00 by Mr. Kaufman personally?

A. Well, I would just have to repeat hearsay. Mr. Kaufman told me—

The Court: I don't want any hearsay.

The Witness: I don't know for a fact.

Mr. Mellinkoff: I have no further questions, your Honor.

The Court: That is all. Call your next witness.

Mr. Mellinkoff: Before the witness leaves the courtroom, however, I would like to say if there are any questions concerning any figures and so forth, I would like them asked of Mr. Asimow now before he leaves because he, rather than the other witnesses, is the one who knows about these figures. As far as I am concerned, Mr. Asimow can go. He is anxious to leave.

The Court: Very well.

(Testimony of William E. Asimow)

Mr. McCall: Let me ask one thing.

The Court: Any more question of this witness?

Mr. McCall: I want him to identify these papers as being the papers on which settlement was made in 1942. [107]

Recross Examination

By Mr. McCall:

Q. I will ask you if these papers were prepared by you showing profit and loss statements of this business, retail at 927 Temple and wholesale at 925 Temple?

A. Yes, sir.

Q. For the months of March to and through September, 1942? A. They are.

Q. Are they the papers on which that settlement was based? A. I think so.

Q. You prepared the papers?

A. That was five years ago but I believe—they look like the ones I prepared. I think I can testify that they are.

Q. I will ask you if you also prepared the profit and loss statements for the retail and wholesale branches of the business for the month of September 1942 for use at the same time? A. I believe so.

Q. And are these papers the papers that you prepared? A. That is right.

Mr. McCall: I will ask that these be made exhibits to the witness' testimony, your Honor. [108]

Mr. Mellinkoff: Are the figures for September included in this statement?

The Witness: Yes, they are included.

(Testimony of William E. Asimow)

The Court: Any objection to their admission in evidence?

Mr. Mellinkoff: No, your Honor.

The Court: All right, they will be marked.

(The documents referred to were marked as Petitioner's Exhibit 1, and were received in evidence.)

The Court: Call your next witness.

Mr. Mellinkoff: Mr. Max Kaufman.

MAX KAUFMAN,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Max Kaufman.

Direct Examination

By Mr. Mellinkoff:

Q. Mr. Kaufman, will you state to the court how it came about before the war that you entered into this percentage arrangement with Gimpelson?

A. I can explain exactly. At that time when I entered in with Gimpelson.

The Court: You will have to speak up.

A. At the time when I was giving Gimpelson a percent- [109] age that was just the time when Joe Arou left to the service and I was left without help and that is my nephew, Jack, he give me the needles.

(Testimony of Max Kaufman)

Q. What?

The Court: What?

A. He give me the needles. He give me a certain thing. He wasn't satisfied and he was raising—talking fresh and different ways and I was trying to satisfy him because at that time I had a market on Fairfax and I was trying to hold to that market, because Dr. Nelson from the Health Department—we was knowing each other for a long time, maybe for 25 years. He said, "Kaufman, you had better get out of this Temple Street from that place because there are rats. I am going to condemn it."

I am just holding down, you know, because it is hard to keep clean. The cooler over there was very good so I thought I will have more time to spare on Fairfax because it is a new market and a great big cooler to do the wholesaling there in the future and Jack should get a little more money here for temporary.

The Court: What did you tell him? What was your agreement with him?

The Witness: That is what I told him. I didn't give him any terms. I didn't write anything with him. I just wanted to make him happy and I promised— [110]

The Court: Did you tell him if he had not gone into the service he would have continued there?

The Witness: Well, he could continue. He could continue even in a week or two weeks because I didn't make any agreement with him at all. I just give it to him that time because I wanted to have more of his time—more time he should put into the business. He should take care of that business. I should be able to go down to that market.

(Testimony of Max Kaufman)

Q. By Mr. Mellinkoff: Now, Mr. Kaufman, after Gimpelson left for the service did you hire anyone to take his place?

A. That is right. Harry Priester.

Q. Do you still own the Fairfax market?

A. Fairfax market? I don't. I had to give up the Fairfax market when the rationing came in with the points and they were selling the points and the meats.

Q. Just a moment, Mr. Kaufman. When was it you gave up the Fairfax market?

A. I think about three and a half years.

Q. About three and a half years ago? A. Yes.

Q. And since that time have you devoted all your time to the business on Temple Street?

A. Temple Street.

Q. Now, Mr. Kaufman, when was your property condemned [111] on Temple Street?

The Court: That was stated this morning. I don't care when it was condemned. I am interested in when it was vacated. That is the only thing, it seems to me, that is material.

Q. By Mr. Mellinkoff: Mr. Kaufman, when did you move your wholesale business from 925 Temple over to Fremont? A. Well, we moved it in three months.

Q. What about the cooler?

A. We were using the cooler—using the cooler a long time.

Q. How long? A. As soon as got ready.

The Court: That doesn't mean anything. When was it?

The Witness: About nine months.

(Testimony of Max Kaufman)

Q. By Mr. Mellinkoff: Mr. Kaufman, how did it happen that your brothers put money into your business?

A. Well, the two brothers? Put money into the business?

Q. Yes.

A. When they condemned my real estate the State bought it for a highway and, well, they didn't give me very much money for it and I have an enlargement of my heart and I am over 60. I am way beyond 60.

The Court: How old are you? [112]

The Witness: I am 62.

The Court: You are not old.

The Witness: And my son is a medical man and he was giving me instructions—I shouldn't be active in business and the fact, you know, I have got medicine from every doctor what he send me to—to Dr. Goldberg and Dr. Ferris.

Q. By Mr. Mellinkoff: That is all right, Mr. Kaufman.

A. And he didn't want me to become active in the business so I was figuring at that time when the State got the real estate I wanted to sell my trucks and make a little money whatever I can and get out of it altogether.

After my younger brother Joe came and Morris was in the business I used to be in business with Morris—

The Court: Don't go into all the details. Just tell what happened.

The Witness: So Joe propositioned me. He is going to invest money to build a new place, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership,

(Testimony of Max Kaufman)

not to work too hard. We should continue in this business and I am very happy they were.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman—

The Court: Then, as I understand it, you were figuring on quitting business until your brothers wanted you to continue the business? [113]

The Witness: I would, yes, if they won't—if they won't start into this business with me I would have sold it all out. I couldn't run it any longer.

Q. By Mr. Mellinkoff: Now, Mr. Kaufman, when Gimpelson came back from the Army do you recall what if any conversation you had when he first started back to work for you?

A. When Gimpelson came back I just opened my arms like a father. I explained to him every bit of it. I put a lot of work in Gimpelson because he never made a living, you know.

Q. Now don't go into that.

A. Excuse me. I don't go into it. I was trying to—he should remain in this business. I explained him. I said, "Jack, the state got the real estate. In fact, I don't have to tell you. You are the one who wanted the coolers from me."

Q. Mr. Kaufman, just tell the court what conversation you had with Jack when he came back.

A. I said, "Jack, I don't own this any more. It is a corporation. Probably the corporation will be effected maybe in a couple of weeks." I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of salary I should put on for Jack because he didn't have the job what we

(Testimony of Max Kaufman)

had before and the meat line was—we couldn't get meat. It was hard to [114] get. It was rationing. So we just got that much. So Morris said, "He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and \$40.00 is the highest we can go."

So I took in Jack. I said, "Jack, they are going to allow you only \$40.00 from the business—the business belongs already to the corporation." My brother—we started in before January yet this is in December. "I will give you \$25.00 from my own pocket. I want you to be satisfied and then we will build up the new plant. We will probably be able to give you a job that will fit you better in it," and with the same proposition I came to Mr. Mellinkoff.

The Court: Did you give him the \$25.00 a week?

The Witness: I did every week.

The Court: Cash or check?

The Witness: No, cash from my own pocket. I kept on giving him and today he object to that. That hurt me very much.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman, when you explained all this to Mr. Gimpelson, to Jack, what did he say?

A. The first couple of months he said—well, let me say one thing more yet.

Q. Just a moment. What did he say? [115]

A. When he first came back to the business there—

Q. And you told him how much you were going to pay him and so forth. What did he say?

A. He was satisfied for two months. On the third month he started to fight with my brothers.

(Testimony of Max Kaufman)

Q. What do you mean by the third month? In March or April?

A. It was in March starting fighting with Morris. He said if he wouldn't be my brother he will stick a knife in him. He is pretty rough because he punched a doctor once on Ninth Street. I wanted to make a man out of him. Excuse me. I said to him, "Jack, my brother Morris he is a well known man. He is a high-class man. He has been in business for years. He can treat you like a son. Why do that?"

Q. By Mr. Mellinkoff: Now, Mr. Kaufman, after this difficulty arose in the business what took place then between you and Gimpelson?

A. I don't get you.

Q. After these difficulties began arising in March or April then what happened?

A. Then it was happened. He quit once. He quit. He wants to quit. In fact, he wanted to quit two weeks before and I hold him back. I really meant to hold him in my business. [116]

Q. Now, just a moment, Mr. Kaufman. Do you recall when you gave him this \$200.00?

A. When I gave him the \$200.00 that time I wanted really to have him out of there because he would have killed my brother, maybe.

Q. Well, then, he went away for a while, is that right?

A. He did, yes.

Q. Then when he came back after you had paid him that \$200.00 and he went away for a while and then he came back, then did he come in to see you?

A. He did.

(Testimony of Max Kaufman)

Q. And what conversation took place at that time?

A. Not so good.

Q. Well, tell the judge what happened.

A. He scared me with the OPA—that is my brother not making out the bills good and all.

Q. Did he say that he knew people down at the OPA?

The Court: I don't care about that, counsel. That is trivial.

The Witness: We don't want to go too far.

Q. By Mr. Mellinkoff: Well, what finally happened there?

A. What finally happened? I said to him—he said, "It won't cost me anything to sue you. I got plenty of [117] lawyers. Wouldn't cost me a dime. And it will cost you money. I will give you plenty of trouble," and he sure give me trouble all right. So I said to him, "Well, go ahead. This country is still a democratic country. Go ahead and do whatever you want."

I know Jack very well. I know him because I was trying to make a good boy out of him. He will never work straight even by the Government.

Q. By Mr. Mellinkoff: Wait a minute.

A. I have got a letter here I would like the judge to read. The reason why I don't lose that letter—

Q. What is that letter?

A. That was the business he was in when he was in the Government.

The Court: I am not interested in that.

Mr. Mellinkoff: I don't think the judge would want to see that.

The Court: Proceed, counsel.

Mr. Mellinkoff: That is all, your Honor.

(Testimony of Max Kaufman)

The Court: Just a moment. He has some questions he wants to ask you.

Cross Examination

By Mr. McCall:

Q. What did you say about you were afraid Jack would knife Morris? [118] A. That is right.

Q. And you said that he was—

A. He came in the office and he said, "If it wouldn't be your brother I kill him. I stick a knife in him."

Q. And what happened that made you think he was talking seriously?

A. Well, I know Jack when he was a kid. He was the worst kid from the bunch. He got brothers. He was the worst one. In fact, I bring him over here to make something out of him. He would be all right if he wouldn't have the protection of the lawyers, of you people. He would have worked all right and he would never ask for anything.

Q. Never mind that. Where was it he was ever in trouble that indicated to you—

The Court: I don't care anything about that, counsel.

Q. By Mr. McCall: Isn't it a fact that this man taught high school, public school?

A. He taught high school?

Q. Yes. A. When?

The Court: I am not interested in that, counsel. Let us get down to the issues.

Mr. McCall: If your Honor please—

The Court: Proceed.

Mr. McCall: He is attacking this man's veracity.
[119]

(Testimony of Max Kaufman)

The Court: He said he threatened his brother with a knife. Suppose he did teach in a high school or didn't teach in a high school? That is not a material issue for impeachment purposes.

Q. By Mr. McCall: Now, you rented the quarters where the store was located, didn't you?

A. I don't get you.

Q. You rented the quarters where both of these stores were located, didn't you?

A. You mean I used to rent them? They were rented?

Q. Yes. You don't own that ground, do you, or never did?

A. No, that is rented; yes, that is rented.

Q. So that the rent was a part of the business operation here, is that right?

A. It is a part of the business, yes.

Q. And all you had to do to continue in this business was to go and rent another place, wasn't it?

A. Well, you see this business—I will explain it, this wholesale business. If you can't drive in with a truck and if you can't drive out with a truck, delivery, then the store wasn't any good. I had my own property there but I used to have a drive-in there and I used to have a storage place before I started in to build. We put up papers and all and we deliver—Cudahy brings in the meat to the rear [120] and we deliver it inside on a rail. You see that wholesale goes on a rail and then when we send our trucks out we send them out from the rear, too, you see. We have got to have a rear platform. We have to have a place to unload it, so the main thing was my piece of real estate because the store alone don't do any good.

(Testimony of Max Kaufman)

Q. You mean you had some vacant property next door? A. That is right.

Q. Close to it? A. Right next to it.

Q. That was used as a driveway? A. Yes.

The Court: What do we care about that?

Q. By Mr. McCall: Now, what was done with this money that your brothers put in? Was it to buy another piece of property?

The Court: Counsel, is it your contention he should have gone out and rented another building to furnish a job for this man instead of building a new building?

Mr. McCall: No, your Honor. I want the facts.

The Court: I understand the facts. It has been pretty well explained that there was additional money put into the company so they could put up a building to house the business.

Q. By Mr. McCall: Did Jack Gimpelson buy any meat for you? [121]

A. They all bought for me meats. Here is a gentleman here—

The Court: Answer the question.

A. He just bought small stuff—offal.

Q. By Mr. McCall: Did you consider him a good meat buyer?

The Court: I don't care whether he was a good meat buyer or not.

Q. By Mr. McCall: I will ask you if he didn't have complete charge of all the buying for three years at that store?

A. My dear, we ain't buying any meat for the last six years because the packing house send you the beef. The

(Testimony of Max Kaufman)

beef is pretty scarce and that is the only time I have been going for beef when there is a shortage. We can't get it.

Q. Suppose you answer the question, please, sir?

A. Yes, sir.

Q. Was he in complete charge of all the buying for three years at that store? A. No.

Q. He was not? A. No.

Q. Did you ever make a statement to that effect?

A. If I ever made a statement to that effect?

Q. To that effect, yes. [122]

A. Here is a girl that—she made it that way.

Mr. Mellinkoff: Answer the question, Mr. Kaufman.

The Witness: No.

Q. By Mr. McCall: You did not? Do you recognize this letter that I hand you now?

A. Well, if this is Elinor's or mine I couldn't tell you. She writes pretty near like I do but Jack sent a letter.

Q. First, did you write that letter?

A. I didn't write that letter. That signature looks like—it is my signature.

Q. You think you signed the letter, though?

A. It is a letter to—

Mr. McCall: I would like the lady to take a look at the letter.

Mr. Mellinkoff: You can call her as a witness in just a moment, may it please the court.

The Court: Counsel, just a moment. I don't care whether this witness bought all the meats or not. The petitioner had a job there at the time he went into the service. Now, whether or not he was entitled to that job back is the real issue here.

(Testimony of Max Kaufman)

Mr. McCall: Your Honor, that is true, but it is also true as to the credence your Honor should put in the testimony of this witness. [123]

The Court: Now, wait a minute, counsel. Whenever you get into a family row, which this apparently is, there is not too much truth coming from the lips of any of the parties. It is at least prejudiced. And in the second place, I assume that is a letter that was written to the Draft Board, is it not?

Mr. McCall: To whom it may concern. It was sent to be used in connection with the Army.

The Court: For deferment?

Mr. McCall: No. It was not for deferment. It was after Mr. Gimpelson was in the Army.

The Court: To help him in the Army?

The Witness: That is right.

Q. By Mr. McCall: Did you sign that?

The Court: We do not take too seriously letters of recommendation, counsel. At least I never did.

Mr. McCall: Well, it recites a fact, if your Honor please, which is as follows—

The Court: Introduce it in evidence. I can read.

Mr. Mellinkoff: We object to it.

The Court: It will be admitted. It is immaterial as far as I am concerned but it will be admitted. It will probably make Mr. McCall happy and then we can go to something else.

(The document referred to was marked as Petitioner's Exhibit 2, and was received in evidence.) [124]

(Testimony of Max Kaufman)

Q. By Mr. McCall: Now, Mr. Kaufman, did you give a statement of your financial affairs to an interviewer for Dun & Bradstreet for the purpose of making a credit report in March of 1946?

Mr. Mellinkoff: I object to this unless there is some foundation laid. I don't see the materiality of it.

Mr. McCall: It is cross examination.

The Court: What is the materiality of it?

Mr. McCall: This is cross examination. I am trying to get to a point.

The Court: I want to know how it is material.

Mr. McCall: I want to know if he was not the sole owner of the business on March 30th, 1946, from his own representation for credit.

The Court: All right.

Q. By Mr. McCall: Were you interviewed on March 30th, 1946 by an interviewer for Dun & Bradstreet, to whom you stated as follows: You confirmed the filing of corporation articles but stated that as yet no application had been made for the issuance of stock and that you remained the sole owner of the business? A. No.

Q. Did you make that statement on March 30th, 1946? A. March 30th, 1946?

Q. To Mr.— [125]

Mr. Mellinkoff: Richardson.

Q. By Mr. McCall: Yes, Mr. Richardson, for the Dun & Bradstreet Company? A. No, I didn't.

Q. You did not?

A. No. Maybe anybody else did but I didn't.

Q. And on April 1st, I will ask you if you pro-rated the wages of the people who worked at the place of business?

(Testimony of Max Kaufman)

Mr. Mellinkoff: I don't understand your question, Mr. McCall, and I don't think the witness does.

Q. By Mr. McCall: On April 1st, 1946 did you pro-rate from that time on the wages of the people, paying them from your own bank account as the Chicago Hotel, Restaurant and Supply Company up until that date, and in your capacity of signing checks, sign checks in your capacity as president for the corporation thereafter?

The Court: I guess there is no question about that, is there? On April 1st there was a change-over in the method of carrying on the business.

The accountant said he set up the books as of April 1st and from then on they had a corporation bank account and that this witness then drew checks on his own personal account instead of drawing them from the business.

Q. By Mr. McCall: Is that the way it was?

A. Something, sir. I don't know. [126]

Mr. Mellinkoff: May it please the court, the witness has difficulty understanding these questions. I think that has already been testified to, anyway, and the witness is just confused by the language that is used here.

The Court: Up until April 1st you carried on your business and drew checks yourself, didn't you?

The Witness: Up to April.

The Court: Under the name of your company, the fictitious name of Chicago Restaurant and Supply Company?

The Witness: That is right.

The Court: Then after you changed over into a corporation you changed your method?

(Testimony of Max Kaufman)

The Witness: Well, yes, we changed over to the corporation.

The Court: And then you signed as president of the corporation?

The Witness: I sign as president of the corporation.

The Court: But before that you signed as the owner?

The Witness: I signed it as—well, as the owner, that is right.

The Court: Did anybody else sign checks besides you?

The Witness: They don't sign any checks right now even today except me.

Mr. Mellinkoff: But you were the one who was signing the checks, Mr. Kaufman? [127]

The Witness: That is right; yes, that is right.

Mr. McCall: That is all, your Honor.

The Court: Take a five-minute recess at this time.

(Short recess.)

The Court: How much longer is it going to take, Mr. Mellinkoff? How many more witnesses do you have?

Mr. Mellinkoff: I don't think I will put on all the witnesses I have brought here. I will just call one or two more witnesses. I have additional witnesses but to save time I would as soon not call them unless your Honor desires their testimony. Morris Kaufman is here and Joseph Kaufman is here and their testimony would simply be corroborative of Max Kaufman's testimony.

Insofar as that letter of recommendation is concerned the bookkeeper, who wrote that letter, is here, and can testify that it was written at his request if that is desired.

As far as the Dun & Bradstreet statement is concerned it is a legal conclusion that Mr. Kaufman is not familiar with.

The Court: I would like to hear from one of the brothers that entered into this business.

Mr. Mellinkoff: Very well, sir. Joseph Kaufman, will you take the stand? [128]

JOSEPH KAUFMAN,

called as a witness by and on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Joseph Kaufman.

The Court: May I be permitted to ask him a few questions?

Mr. Mellinkoff: Certainly, your Honor.

The Court: When did you first put money into this business?

The Witness: 1944, your Honor.

The Court: 1944?

The Witness: 1945, your Honor.

The Court: 1945?

The Witness: Yes, sir.

The Court: Were you working there at the time?

The Witness: No, sir. I came here for a visit from Chicago.

The Court: You came here for a visit?

The Witness: From Chicago.

The Court: And how much did you put in at that time?

(Testimony of Joseph Kaufman)

The Witness: At that time I gave a deposit on a piece of ground, in escrow \$2,000 and more money followed immediately for my partnership in this business. [129]

The Court: What was your agreement? Under what circumstances did you make a deposit upon this ground? What agreement did you have with your brother Max?

The Witness: Your Honor, when I came here I found out that my brother has to go away from the business, that his place is going to be taken away by the State. He was downhearted a little bit after being in business so long in one place, so I tried to cheer him up. I said, "Nothing is lost yet. We don't know. And I might go in with you. We will see what we can do." And I talked it over with my middle brother, Morris Kaufman, and then I spoke to Max again and I give him a proposition.

The Court: What proposition did you give him?

The Witness: I said, "Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, a real good, going business, and we will be proud of it and I will make you proud of the business that you are in right now," and I am trying to do that, your Honor.

The Court: Well, did you have any understanding at that time as to the shares? Did you have an understanding with reference to the 40, 30 and 30 basis?

The Witness: Not that my brother asked for it, but his accountant asked for 51 per cent.

The Court: His accountant did? [130]

The Witness: Yes. You know a matter of routine—just conversation. So I explained to him I wouldn't give up a business in Chicago and sell out and come here to my brothers and feel that I only got a minor part in the

(Testimony of Joseph Kaufman)

business. I said, "I think I am capable of taking an active part and it wouldn't be fair to all of us but it would be fair," being that he is in the business, "you should go in 30, 30 and 40."

The Court: When did you agree on that?

The Witness: That was in 1945, your Honor.

The Court: When did you decide to incorporate?

The Witness: Right then and there when we went out to buy a piece of ground. I came in when I made up my mind and I set my mind to business immediately and we went out to look up the piece of ground and I gave a personal check, deposit of \$2,000 immediately.

The Court: We don't care about the checks unless there is some question about it.

Mr. McCall: That was December 5th, your Honor, payable to escrow.

Mr. Mellinkoff: December 6th was the date of the check, 1945.

Mr. McCall: Payable to the Los Angeles Escrow.

Mr. Mellinkoff: That is right.

The Court: After that who managed the business?
[131]

The Witness: After that I went back to Chicago to liquidate my own business.

The Court: Who was managing the business when you went away?

The Witness: Max Kaufman and Morris Kaufman were there to manage the business when I went away.

The Court: How much money did you put in the business?

The Witness: Well, off-hand I couldn't tell you, but a considerable sum.

(Testimony of Joseph Kaufman)

The Court: You heard the statement of the accountant here.

The Witness: Yes, sir; he was quite right.

The Court: Was that correct?

The Witness: Yes, that is a correct statement. I put in additional money as we needed it as we go along, as much as we need.

The Court: Do you know how much your brother put in?

The Witness: Well, fortunately he could put in his assets—that was his assets in the business.

The Court: I mean Morris Kaufman?

The Witness: Well, honestly, your Honor, I advanced Morris Kaufman a little bit of money to go into business.

The Court: And you made that arrangement in the latter part of March, 1945?

The Witness: Yes. I had only the welfare of my [132] brothers in my mind.

The Court: That is when you made the arrangement?

The Witness: Yes, that is the time we made our arrangement.

The Court: And you have been interested in the business ever since?

The Witness: Yes, sir.

The Court: That is all the questions I care to hear from you.

Mr. Mellinkoff: I just want to ask one additional thing.

(Testimony of Joseph Kaufman)

Direct Examination

By Mr. Mellinkoff:

Q. Who actually built this new building?

A. I did, sir.

Mr. Mellinkoff: Your witness.

Cross Examination

By Mr. McCall:

Q. When did you come back from Chicago?

A. I came back February 7th. Why I know it is February 7th is because my son wanted to go into the Army from Los Angeles instead of going in from Chicago and he had just graduated from school. That is why I know it is the 7th when we came in at that time.

Q. Then you finally got all the business straightened [133] out by April 1st to take over the store?

A. The business was straightened out before I left. I would not leave if the business was not finished. The business was straightened out when I left. I will come back when I liquidate my business in Chicago and I come back. As far as money was concerned I told my brothers not to worry about it, I will finance it all the way through as much as we need for this kind of business and that he should be proud of what I had in mind about another business, manufacturing sausage.

Q. That was an additional type of business?

A. Additional to this because this is not big enough.

Q. And that was what the new building was built for?

A. This building was built for sausage business. Unfortunately we couldn't get no permit to build the factory.

(Testimony of Joseph Kaufman)

Q. The building that was built?

A. The building that was built to move on Mr. Kaufman's first piece of property that he had on the premises, we moved these pieces over. They were old property. We moved them over and we made something to look at.

Q. Is that the piece of property over there where the building was put up—was that to have been the place where the sausage business was to be put?

A. Well, over there? No, it can't be used for [134] sausage over there.

Q. Can't be?

A. But there is plenty of ground to improve it and make more if we get—if material will be available but it is not.

Q. How much money had been put in—actual money had you put in up to—prior to the time that you came back on February 7th?

A. Honestly, offhand I couldn't tell you, but I know I put in one time \$15,000 and—

Q. Was that before or after you came back from Chicago?

A. The \$15,000 was after I came back from Chicago, yes, but \$6,000 I put in before I even be here—before I came in the second time.

Q. In other words, you put up \$4,000 in addition to the \$2,000?

A. Yes, to make things go because I know when I come back I have to do something.

Q. Now, the sausage business—what is the holdup on getting into that now?

A. You can't get material to build and we couldn't get no priority for it.

(Testimony of Joseph Kaufman)

Mr. Mellinkoff: Are you through with the witness, Mr. McCall? [135]

Mr. McCall: Yes.

The Court: That is all. I would like to hear from the other brother.

Mr. Mellinkoff: Mr. Morris Kaufman, will you take the stand?

MORRIS KAUFMAN,

called as a witness by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Morris Kaufman.

The Court: When did you become interested in this business? When did you first have a financial interest in it?

The Witness: The last time it was in December 1941.

The Court: When did you put money into the business?

The Witness: In the corporation?

The Court: Yes.

The Witness: The same time as my brother Joe has put in his \$2,000 I put in my \$5,000.

The Court: You put in \$5,000 at that time?

The Witness: Yes, sir.

The Court: Did you put the \$5,000 in the business at that time?

The Witness: In the business and property all the way through. [136]

The Court: At that time did you three men have an understanding that you were to have 30 per cent?

(Testimony of Morris Kaufman)

The Witness: Yes, sir.

The Court: And you were managing the business at that time?

The Witness: Yes, sir.

The Court: In the meantime they disposed of the Fairfax business?

The Witness: That is right.

The Court: So you only had the one place of business?

The Witness: That is right.

The Court: That is all I am interested in. Just a moment. Did you ever have any trouble with Gimpelson?

The Witness: Well, as a matter of fact, I very much like Mr. Gimpelson but he didn't like me. I don't believe he can furnish a reason why.

The Court: You never had any trouble with him?

The Witness: No, sir.

The Court: That is all.

Cross Examination

By Mr. McCall:

Q. Did Mr. Gimpelson ever offend you in any way?

A. What?

Q. Was Mr. Gimpelson offensive to you in any way at any time? [137]

A. No, sir; not in words. We never spoken to one another. Only thing he aggravated me by cutting up the meat wrong and that is the truth.

Q. When was that?

A. Oh, the time when he got back from service. I was more than glad to have him. We could have re-

(Testimony of Morris Kaufman)

maintained friends until today if he wanted to. That was up to him.

Q. What kind of wrong cutting did he do? What was it? A. There are lots of ways—

The Court: I don't care about that.

Mr. McCall: I believe that is all.

The Court: This witness is excused?

Mr. Mellinkoff: Yes, your Honor. That is all.

The Court: Have you any argument you wish to present?

Mr. McCall: I would like to call two witnesses, your Honor.

The Court: All right.

Mr. McCall: Mr. Richardson.

WALTER CHARLES RICHARDSON,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified in rebuttal as follows:

The Clerk: What is your full name?

The Witness: Walter Charles Richardson. [138]

Direct Examination

By Mr. McCall:

Q. Mr. Richardson, where are you employed now?

A. At the present time I am employed as right-of-way man by the Southern California Gas Company.

Q. On March 30th, 1946 were you employed by Dun & Bradstreet? A. I was.

Q. Are they people who get up credit reports on businesses? A. That is right.

(Testimony of Walter Charles Richardson)

Q. Did you on that date interview Mr. Max Kaufman with respect to his business? A. Yes, I did.

Q. I will hand you a paper and ask you if you will state—

Mr. Mellinkoff: I would like to see it.

Mr. McCall: All right.

The Witness: Yes, this is my number up here. I wrote this report.

Q. By Mr. McCall: Did you make the report to the company of an interview that you had with him on that day? A. Yes, I did.

Q. I will ask you if that is, what you are looking at there, is the report you made? [139] A. Yes.

Mr. Mellinkoff: May I read this for just a moment?

The Court: There is only one question. Did Mr. Kaufman tell you that he was the sole owner of that business on that date?

The Witness: Yes, he did, sir.

The Court: Did he tell you it was incorporated?

The Witness: No, he didn't tell me it was incorporated. He said there had been plans but no issuance of stock at the present time.

The Court: He said there were plans?

The Witness: Yes, sir.

The Court: Did he tell you who the other parties were that were interested?

The Witness: Yes, sir. He told me that his two brothers were interested, were going to be officers in the corporation.

The Court: Did he tell you that they had put some money in?

(Testimony of Walter Charles Richardson)

The Witness: No, he didn't tell me they had put money in.

Q. By Mr. McCall: Did he tell you this specifically, that he confirmed the filing of the corporation articles but stated as yet no application had been made for issuance of stock and that he remained the sole owner of the business? [140]

A. That is right. May I clarify one thing, your Honor? I went out to interview him because a questionnaire had been sent in to the office asking if this business had incorporated. It was a commercial query.

The Court: Counsel, what was the date of the issuance of the stock?

Mr. Mellinkoff: I could not tell you offhand.

The Court: You had to obtain a permit?

Mr. Mellinkoff: Yes, but I could not say offhand. I know it was decided to issue the stock a long time before it was actually issued. I could not give you those exact dates.

Mr. McCall: I subpoenaed the stock book of the corporation but I haven't seen it here today. I served the subpoena on Mr. Max Kaufman.

Mr. Mellinkoff: May I ask the witness a question?

The Court: Yes.

Mr. Mellinkoff: Mr. Kaufman, you say, said that he was the sole owner of the business. Did he use those words or did you use those words?

The Witness: The words—I asked Mr. Kaufman, I said, “Well, Mr. Kaufman, has this business been incor-

(Testimony of Walter Charles Richardson)

porated as of yet?" And he said, "No, it hasn't," and I said then, "You are still the sole owner of the business?" And he said, "Yes, I am." [141]

Mr. Mellinkoff: Did you ask him whether or not his brothers had any money in the business?

The Witness: No, I did not ask him that.

Mr. Mellinkoff: That is all.

Mr. McCall: That is all. Mr. Corral.

EDWARD CORRAL,

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified in rebuttal as follows:

The Clerk: State your full name.

The Witness: Edward Corral.

Direct Examination

By Mr. McCall:

Q. Mr. Corral, were you employed by Mr. Max Kaufman in the meat business out there on Temple, West Temple Street in 1941? A. I was.

Q. What was your position?

The Court: Counsel, I do not care what his specific duties were at that time.

Mr. McCall: Well, I had these men here, your Honor—

The Court: That does not mean I have to listen to them.

Mr. McCall: That is correct. That is all he was going to testify to. [142]

The Court: That is all.

Mr. McCall: We rest, your Honor.

The Court: I will listen to any argument you wish to present. You resented before when I did not permit you to make a speech, so I am going to give you that opportunity now.

Mr. McCall: If your Honor please, this is a case of a veteran who came back from the war seeking his former position.

I do not believe there is enough dispute about the facts in this case to make any great big difference. Of course there have been some issues presented that the veteran was not general manager and this was a temporary arrangement, but the facts do not support that.

It is very clear this man was the manager of that business before he went to war; that he had been there as manager for some time and that this profit-sharing arrangement was entered into when the business got on its feet and was ready to make some money for Mr. Kaufman.

The young man was drafted and taken away from that job and went to war.

Now, it is said that the Fairfax Avenue store had something to do with the matter but I don't believe it did because the testimony is that Mr. Max Kaufman was around this Temple Street store quite regularly. He was the [143] owner. He was around and generally supervised everything because he owned it. But Mr. Gimpelson here was the manager of the Temple Street business and received a 50 per cent cut of the profits of the wholesale business and 25 per cent of the retail business.

It was perfectly satisfactory with everybody that that be the arrangement at that time. He went to war and he came back. There is nothing wrong with the man at all. He is a perfectly good man. He must have been

given some pretty fair investigation to be passed and be employed by the OPA now.

He knew the business. You could tell that by the questions that were asked of him.

When he came back his uncle had been in conference with some of his brothers there about putting some money in this business and incorporating. They were going to do that.

The arrangement had already been made they testified, although it had not been carried out. Steps had been taken to put in escrow a piece of property to be built by the corporation when they got the property cleared. In the meantime this store was continued to be operated there.

The veteran came back just about the time that the deal was made looking to the acquisition of this property.

Now, if your Honor recalls the testimony of the brother Joseph, this arrangement that these three brothers [144] had was not simply continued this business and provide a home for it. They were looking to go into the sausage manufacturing business on a rather large scale. They were going to expand the business, so that that was involved in this matter in addition to simply the formation of the corporation.

The brothers all knew of the relationship this young man had to the store before. Morris had been there and had been working under this man. He came back and he applied for his job.

Now, he told, and I believe your Honor put credence in what he said, about his conversation there with Max Kaufman at the time he went to work or during December there, at the time he went to work in January of 1946.

He wanted to get along with Morris and when Joe got back from Chicago to get everything straightened out.

So he went to work and apparently he didn't cut meat right, according to Morris' way of thinking, so for some reason or other, which I don't know, some sort of little dispute got up there and the man was not put back to doing the same thing he had done before he was put back to a service job. He was just working there while these men were getting adjusted so that he would be given an opportunity to go ahead with the business.

Now, ultimately this piece of property for the expansion of this business was acquired and about nine months [145] ago they began to put some refrigeration and stuff over there and about three months ago they finally got the wholesale part of this business over to that location, but even today and right now the property where this business was located is still there and being operated by these same people, by Max Kaufman.

Max Kaufman is the president of the corporation. This corporation did not take over any portion of this business until April 1st, 1946. The articles of incorporation were filed January 21st, 1946 and there is a date there showing stock, when it was filed sometime in February.

Mr. Mellinkoff: January 24th, I believe.

Mr. McCall: And when was it filed in Los Angeles?

Mr. Mellinkoff: January 24th.

The Court: Let us not argue about that.

Mr. McCall: Even then there was no transfer of this business. In order to get this business that was here into that corporation there has to be a transfer. It just don't automatically hop over there. That was done on the date of April 1st, 1946.

Now, until that time it is perfectly obvious what the law was—what Mr. Richardson said that Mr. Kaufman told him on March 30th that he was the sole owner of

this business and he still had the business. He was obligated, perhaps, to make a transfer in the future when all these things were to [146] be done but he, up to that point, was the sole and complete owner of that business.

The reason why he did not want to put this young man back in the place of manager, as far as I can see, was that Morris was there and had put up some money and was going in the business with him and didn't want that blocked off. He wanted to go ahead and then after "we all get there I will take care of Jackie and give him a substantial part and job in this sausage manufacturing outfit and in the wholesale business." Now, that was it. Well, it then developed and here was the turning point, after they had got the business incorporated and got it going the young man wanted to be taken care of.

\$40.00 a week is no money. He has a family to support. He had to have some more money than that. "Now is the time for me to get a job if I am going to have a job." "Well, Jackie, all the job you can get is if you go out and get some money and put in this corporation we will give you a job." This is after he came back. "If you don't buy some stock in this company you won't be in it." That is not disputed.

Then there is just nothing to do about it. "We can't manage Morris. We can't do anything else about it."

Those are the facts with which your Honor has to deal in this case. And I think they are material facts. [147]

I don't say that the Selective Service Act tied up all the property in the country so there couldn't be a re-arrangement or transfer of business, but I do say that it did give a man a right to his job when he came back—the same job he had unless it was unreasonable and impossible for the employer to put him in that job—unless

circumstances had so changed it would be unreasonable or impossible.

Now, when this man applied for his job it was neither unreasonable nor impossible to put him back in as the manager of that business, pending at any rate the formation of this corporation and that still was in the embryo state. It had not been carried through.

The Court: Let me ask a question. When he came back and re-entered the employ of this company he was apparently willing to go along until they had their blow-up in April when he received the \$200.00.

Now, assuming that a returned veteran accepts a position when he is entitled to a position of like seniority and pay, if he accepts a position of less pay and less seniority and continues under that can he at the end of the year sue for the difference under your construction of the statute?

Mr. McCall: I think, if your Honor please, that altogether depends upon what is right.

The Court: But up until they had their difficulty in April had he waived any of his rights? My position is that [148] he was entitled to his job for a year when he came back. However, when he came back he was told conditions were different. If he was not told that he could at least see it. But they did have a job for him and they gave him \$40.00 a week. He continued in that position at \$40.00 a week until the last two weeks he received \$55.00 a week and then there was some trouble came up and he took his vacation. He was given \$200.00 to go on a vacation.

Up until that time hadn't he, at least during that period, waived the benefits of the Act?

Mr. McCall: I don't think he had, your Honor, for this reason. He was relying upon a future course of conduct to take care of him and that was breached when they told him that in order for them to take care of it he had to get some money and put it in there.

They didn't carry through with him. They put another condition on it which barred him from enjoying the benefits of any portion of the Selective Service Act when they demanded that he acquire stock in this company as a condition to remaining there with a fair job.

In other words, this entire course of conduct was induced by the promise of Max Kaufman to take care of him down here when this company was formed. Then when Max Kaufman demanded that he put up money and buy stock in the company that was an additional thing that takes away any [149] consideration of consent for the period prior to that time.

Now, the man was legally entitled to this right. He received nothing of value greater than he was entitled to at any time. There was no waiver there. He simply went to work under the inducement and expectation when this corporation was put up he would be taken care of and that was satisfactory with him.

Now, when it was required that he buy stock in order to keep his job that is something else again.

Now, I don't see, your Honor, how it could be said that this man has waived any of his re-employment rights for any portion of the period during which he was there because they didn't carry out their part of the thing. They breached it in the end. Max Kaufman breached it in April, in the latter part of April 1946.

Now, passing on from that, your Honor, and getting into whether or not this corporation is obligated to this

veteran, it has been said in the Fishgold case that no contract between an employer and other men, including labor unions, could detract from the veteran's re-employment rights. And there are a couple of cases on their way to the Supreme Court now involving the question of whether or not a union contract which impairs the position which the veteran formerly held, which union contract was entered into after the beginning of his military service, the change being detri- [150] mental to him, is binding upon him when he comes back. That is in the Trailmobile case which was argued before the Supreme Court a few days ago.

But it seems to be settled law so far as I know under the Fishgold case, that you cannot bargain a veteran's re-employment rights away.

The Court: Are we trying a union case here?

Mr. McCall: No, but it is a contract case. All of it is contract. In one case it is a contract with five thousand employees and in another contract with a—

The Court: Counsel, there are certain conclusions I have come to. I am going to let you talk as long as you want in order to let you make your speech. You said you wanted to make a speech before and felt kind of hurt because I wouldn't let you make a speech and wave your arms, so I am going to give you this opportunity, but let us stay with this particular case.

Mr. McCall: I was referring to that solely on the basis that the veteran's re-employment rights cannot be contracted away between the employer and a third party.

It was recently held in a San Francisco District Court that where a business had been transferred to a third party and it was a bona fide sale during the absence of the veteran, that the third party was not obligated to re-

employ the veteran. That case was cited in the brief of respondents and I agree with that case. I do not think [151] the law puts a lien on the property of the employer, but that is not the case here.

In this case a veteran returned while the employer still had the business. It was within his power to re-employ the veteran and not to discharge him without cause for a year.

He did re-employ the veteran. The veteran went back into his service.

Now, when re-employment occurred a contract of re-employment occurred under the law in which the employment provision was written: That "I, Max Kaufman—" this was the implied legal effect, "I, Max Kaufman, re-hire Jack Gimpelson and will not discharge him without cause for a year and will restore him without loss of seniority" and so forth, "to the place he had before."

Now, that is the provision of the law and the law automatically enters into every contract that is effected between two individuals regulated by it, so that that was the contract.

Now, I am saying in this case, your Honor, that I doubt there is any clear answer to the question whether or not Max Kaufman could entirely dispose of that business to third parties and thereby deprive the veteran of his re-employment rights during that year without himself becoming personally liable for it. I do not concede that but I do [152] say that where the employer simply merges his interest into a succeeding corporation or a partnership or something else he is obligated to re-employ a veteran and retain him for a year—that there is a legal obligation that goes on into that succeeding entity into which he merges his business. It is just as much a part of the

obligation of that business and that employer to continue that employment on a merger as it was on the individual employer to do so.

That is the argument that I make here and that the merging of this business into a corporation which was formed for the purpose of acquiring a place to house the business and expand the same did not relieve that business nor the employer of retaining this veteran in its employ.

To the extent that there was a contract of re-employment entered into Max Kaufman was not free thereafter to simply voluntarily divest himself of all his legal obligation with impunity. I say there was a legal duty. There also was a moral duty and, as I say, there was a legal duty to see that this veteran was taken care of; a legal duty to see that he was—that in the merger his re-employment rights to work were protected for a year in order that he may get back into civilian life. That obligation rested on Max Kaufman and he could not voluntarily and for his own benefit divest himself of that obligation.

That is the problem in this case, your Honor, [153] and it is the problem that I think should be answered in favor of returning veterans.

I don't say that they have a lien on any portion of an employer's business, but the employer's freedom of contract is affected by the return of a veteran to this employer. He owes him a legal obligation to employ him and not to discharge him for a year.

If it becomes impossible for him to do so, without his own voluntary act taken for his own benefit then I say he is discharged of that liability. That is an involuntary divestiture of the obligation, but where he willingly does so for his own benefit—

The Court: Counsel, just a moment. That is an unfair statement: "He willingly did so." There is nothing here to indicate any bad faith on the part of Mr. Kaufman in disposing of his business.

Mr. McCall: I did not mean that.

The Court: And I think that is an unfair inference.

Mr. McCall: I did not mean to make such an inference, your Honor.

The Court: That is the inference that naturally follows, that he "divested himself willingly of his property."

I want to say frankly, that I have been more impressed by Mr. Kaufman than I have with the petitioner in their testimony. It carries more weight with me. [154]

Mr. McCall: I am not intending to impugn the motives of Mr. Kaufman, your Honor, into entering into this arrangement. I simply contend that as a matter of law his obligation followed into the merged enterprise and that in fairness that should be the construction and application of the re-employment provisions for the protection of men who do return from the service.

I don't think that a purchaser of a business is obligated to look and make inquiry about whether or not there are veterans there who he must continue in his employ. But the obligation should rest somewhere in the case of mergers of this kind and I think it should rest on the former employer to take care of his former employees, and I believe where the former employer still has an interest, still controls and runs the business, that he should carry that into the merged business.

The Court: I am going to take the matter under submission and if you have any points and authorities, file them within five days.

My present state of mind is to hold that the employer's position is so changed as to render re-employment unreasonable and impossible.

Now, that is my present state of mind. If you wish to submit any points and authorities you may do so.

I have given these parties an opportunity to get [155] together. They seem to want to continue to quarrel. I told you somebody would get hurt by my decision and somebody is going to get hurt. I do, however, feel there was a change, an absolute change in this business and the conditions of it.

The business, the property itself was effected and disposed of. He disposed of the Fairfax market in the meantime.

Here was a man who was getting along in years. He had to either pull out or bring in new blood. Those things necessarily transpired. They were not done intentionally for the purpose of avoiding any responsibility that he may have owed to the petitioner. I feel that conditions had so changed that for him to have done otherwise would have been unreasonable and impossible.

However, I am willing to give either side five days to submit any points and authorities they may desire to submit. Otherwise I will decide the case if they are not received within five days.

The matter will stand submitted.

(Whereupon, at 4:30 o'clock p. m., the above entitled matter was concluded.)

[Endorsed]: Filed Jun. 2, 1947. [156]

[Endorsed]: No. 11660. United States Circuit Court of Appeals for the Ninth Circuit. Jacob S. Gimpelson, Appellant, vs. Max Kaufman, doing business as the Chicago Hotel and Restaurant Supply, and Chicago Hotel, Restaurant and Meat Supply, Inc., a corporation, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 20, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,660

JACOB S. GIMPELSON,

Appellant,

vs.

MAX KAUFMAN, dba the CHICAGO HOTEL AND
RESTAURANT SUPPLY; and CHICAGO HOTEL,
RESTAURANT AND MEAT SUPPLY, INC., a
corporation,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF THE PARTS
OF THE RECORD NECESSARY FOR THE
CONSIDERATION THEREOF

Comes now Jacob S. Gimpelson, the appellant herein, pursuant to Rule 19(6) of the Rules of this Court, and hereby adopts the "Statement of Points on Which Appellant Intends to Rely on the Appeal," filed with the District Court Clerk on June 2, 1947, as and for his statement of the points on which he intends to rely in this Court. (See Transcript of Record, page 28.)

Appellant Gimpelson further hereby designates those parts of the record which he thinks necessary for the

consideration of the said points, and for printing, as follows:

* * * * *

JAMES M. CARTER

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

Chief of Civil Division

By James C. R. McCall, Jr.

Assistant U. S. Attorney

Attorneys for Appellant

[Endorsed]: Filed Jun. 24, 1947. Paul P. OBrien,
Clerk.

